No. _____

In The

# Supreme Court of the United States

October Term, 1995

LAW PRACTICE OF J.B. GROSSMAN, P.A.,

*Petitioner,*

versus

SECURITIES AND EXCHANGE COMMISSION,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Should this Court grant certiorari to review the decision of the Eleventh Circuit Court of Appeals which determined that an *ex parte* temporary restraining order issued pursuant to Rule 65(b) of the Federal Rules of Civil Procedure becomes an enforceable preliminary injunction once the temporary restraining order expires under the time limit set forth in Rule 65(b), notwithstanding this Court's decision in *Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers Local No. 70 of Alameda County*, 415 U.S. 423 (1974), that a temporary restraining order expires within the time limit imposed by Rule 65(b) unless a preliminary injunction containing findings of fact and conclusions of law is issued by the district court.

Should this Court grant certiorari to review the decision of the Eleventh Circuit Court of Appeals which determined that an *ex parte* temporary restraining order issued pursuant to Rule 65(b) of the Federal Rules of Civil Procedure becomes an enforceable preliminary injunction once the temporary restraining order expires under the time limit set forth in Rule 65(b), notwithstanding Rule 65(b) provides that a temporary restraining order "shall expire" by its own terms after twenty days.

## LIST OF PARTIES

1. Berger, Thomas W., Defendant.
2. Comcoa Ltd. a/k/a Comcoa Ltd., Inc., Defendant.
3. Law Practice of J.B. Grossman, P.A., Petitioner.
4. Levine, David, court-appointed Receiver.
5. Securities and Exchange Commission, Respondent.
6. Sun-Sentinel Company, Claimant.
7. Mobitel Services, Corporation, Claimant.
8. Beny Quattrociocchi, Claimant.



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Petitioner, Law Practice of J.B. Grossman, P.A., respectfully prays that a Writ of Certiorari issue to review the judgment of the Eleventh Circuit Court of Appeals entered on December 1, 1995, and subsequent denial of the Motion for Rehearing on February 15, 1996.

## OPINIONS BELOW

On March 13, 1995, the District Court for the Southern District of Florida granted Respondent's motion to hold Petitioner in contempt for violation of a temporary restraining order orally extended by the District Court, which Petitioner contended violated Rule 65(b) of the Federal Rules of Civil Procedure and directly contradicted this Court's decision in *Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers Local No. 70 of Alameda County*, 415 U.S. 423 (1974). (App. 37). On December 1, 1995, the Eleventh Circuit Court of Appeals affirmed that decision and held that the Petitioner violated a preliminary injunction because the temporary restraining order became a preliminary injunction when it expired. (App. 1). The Senior Circuit Judge wrote a concurring opinion, *dubitante*. (App. 8). The Eleventh Circuit Court of Appeals denied Petitioner's Motion for Rehearing and Suggestion of Rehearing En Banc on February 15, 1996. (App. 19).

## JURISDICTION

Judgment of the Eleventh Circuit Court of Appeals was entered on December 1, 1995, and rehearing denied

on February 15, 1996. This Court's jurisdiction to consider this petition from the judgment or decree by the court of appeals is invoked pursuant to 28 U.S.C. § 1254(1).

## STATUTES

Rule 65 of the Federal Rules of Civil Procedure.

> **(b) Temporary Restraining Order; Notice; Hearing; Duration.** A temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give notice and the reasons supporting the claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if the party does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.



See also Appendices at 117.

## STATEMENT OF THE CASE

Petitioner Law Practice of J.B. Grossman, P.A. was counsel to the Defendants before the United States District Court for the Southern District of Florida, docket no. 94-8256-CIV-SH, in an action by Respondent Securities and Exchange Commission alleging, *inter alia*, the sale of unregistered securities by the Defendants. The proceeding began on May 5, 1994, when Respondent filed, among other things, an *ex parte* motion for a temporary restraining order ("TRO"), a preliminary injunction and the appointment of a receiver.

On May 6, 1994, at 9:25 a.m., the district court entered a TRO, appointed a receiver and set a hearing for

May 16, 1994, on the application for a preliminary injunction. The TRO included a freeze of the Defendants' assets, which covered trust funds held by the Petitioner on Defendants' behalf.

On May 11, 1994, the Defendants filed, *inter alia*, an emergency motion to dissolve the TRO and a motion to dismiss the complaint for lack of subject matter jurisdiction. On May 16, 1994, the district court held a hearing on the application for a preliminary injunction and heard argument on all the aforementioned motions. The hearing concluded on May 17, 1994. The trial judge announced at the close of the hearing that he was extending the TRO until further order and that the status quo would remain until a ruling on the Defendants' motions.

On May 27, 1994, twenty calendar days after entry of the TRO, Petitioner, as the Defendants' counsel, notified the Receiver it was Defendants' position pursuant to Rule 65(b) of the Federal Rules of Civil Procedure ("Rule 65(b)") (App. 117) that the TRO had expired. Petitioner informed the Receiver that the Defendants would not consent to an extension of the TRO and, since there was no valid restraining order in existence, the Defendants demanded return of their property from the Receiver. The Receiver refused the demand, in part, based upon his position that the TRO lasted for 20 **business** days under the Federal Rules and, according to his calculation, the TRO was therefore in effect until June 1, 1994. The Defendants took no further action at that time.

On June 3, 1994, Petitioner contacted the chambers of the trial judge to ascertain whether a preliminary injunction had been issued. An administrative assistant advised



Petitioner that no preliminary injunction had been issued. On that same day, the trial judge issued an omnibus order which, relevant to these proceedings, denied Defendants' May 11, 1994, motion to dissolve the TRO and motion to dismiss.

On June 6, 1994, Petitioner contacted the Clerk of the district court and the trial judge's chambers to inquire whether a preliminary injunction had been issued. The Clerk responded that no order had been issued. The trial judge's assistant responded that a preliminary injunction had been issued. Later that day, Petitioner requested a facsimile copy of the preliminary injunction order from the judge's chambers. At that point, the same assistant told Petitioner that she was previously mistaken and no preliminary injunction had been issued. Petitioner inquired whether any order would be rendered that week. The assistant responded that she was not aware of any forthcoming order.

Prior to June 6, 1994, Petitioner advised the Defendants that according to Rule 65(b) (App. 117) and this Court's decision in *Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers Local No. 70 of Alameda County*, 415 U.S. 423 (1974) (App. 37), if no preliminary injunction was issued by the district court and twenty days passed from the date the district court issued the TRO, there was no valid restraining order in effect and the Defendants were free to reclaim and make use of their property. Thus, on June 5, 1994 and again on June 6, 1994, Defendants instructed Petitioner to make a second demand upon the Receiver for return of their property and to transfer sufficient trust account funds to compensate Petitioner for the legal fees and costs incurred thus

far in their defense (including about $22,000 of costs advanced by Petitioner). Petitioner made the demand upon the Receiver and transferred approximately $92,000 from its trust account to Petitioner's operating account. When the Receiver refused the second demand, the Defendants moved the district court to issue an order releasing their assets.

On June 7, 1994, the district court entered an order of preliminary injunction *nunc pro tunc* to June 3, 1994. The *nunc pro tunc* was handwritten by the trial judge at the end of the order without any explanation.

On June 10, 1994, Petitioner filed Defendants' appeal of the district court's preliminary injunction and omnibus order. Soon thereafter, Petitioner was permitted to withdraw as counsel to Defendants and the appeal was not pursued by the Defendants.

On August 11, 1994, Respondent moved to hold the Petitioner in contempt for violating the TRO when it transferred the Defendants' trust funds into Petitioner's operating account. Petitioner immediately placed the funds in question into a segregated trust account, where the interest earned on the funds was paid to the Florida Bar.

On January 9, 1995, a show cause hearing was held on the motion. Petitioner presented two witnesses, attorneys J.B. Grossman, Esq. and Kenneth J. Dunn, Esq., partners/shareholders of Petitioner law firm. Grossman and Dunn testified that in advising their clients and subsequently transferring the trust funds pursuant to their clients' instruction, they relied upon the language of Rule 65(b) and, specifically, this Court's interpretation of the rule in *Granny Goose*, that a temporary restraining



order expires within the time limit imposed by Rule 65(b) unless a preliminary injunction containing findings of fact and conclusions of law is issued by the district court.

On March 13, 1995, the trial judge entered an order holding Petitioner in civil contempt for violating the TRO. The judge ordered Petitioner to pay over the transferred funds and to pay interest on the monies from June 15, 1994, notwithstanding the interest earned on the disputed funds was paid directly to the Florida Bar.

Petitioner timely appealed the district court's contempt order to the United States Court of Appeals for the Eleventh Circuit. Petitioner and Respondent stipulated with the Court of Appeals' approval that Petitioner would pay over the funds and interest to the Receiver, who would then hold the funds in a segregated account during the pendency of the appeal.

On December 1, 1995, a three-judge panel of the Eleventh Circuit affirmed the district court's contempt order. The panel found that the TRO expired **prior** to Petitioner's transfer of the Defendants' funds, but held that the TRO automatically became an enforceable preliminary injunction when it expired and found Petitioner in violation of a preliminary injunction.

Senior Circuit Judge Hill, who sat on the panel, wrote a concurring opinion, *dubitante*, recognizing the inherent danger in the majority opinion. He wrote:

> . . . We uphold the contempt imposed for violation of an expired TRO in this case at the

> expense of making unclear the duration of emergency orders that deprive a party of the free use of his or her property. This is not appealing in a free society. Furthermore, we eviscerate the protection afforded by Rule 65(b). . . .

Opinion at 8-9 (App. 11).

Petitioner timely filed a Motion for Rehearing and Suggestion of Rehearing *En Banc* with the Eleventh Circuit. On February 15, 1996, the Eleventh Circuit denied Petitioner's Motion for Rehearing and Suggestion of Rehearing *En Banc*.

## REASONS FOR GRANTING THE WRIT

It is respectfully contended that the United States Court of Appeals for the Eleventh Circuit has decided an important federal question in a way that conflicts with relevant decisions of this Court. In the decision below, the Eleventh Circuit refused to follow the clearly stated mandate of this Court in *Granny Goose*, when interpreting Rule 65(b) of the Federal Rules of Civil Procedure.

In *Granny Goose*, this Court heard the appeal of a contempt order for violation of a TRO granted pursuant to Rule 65(b) where such violation occurred after the twenty-day time limit set forth in the rule. The Court held that under Rule 65(b), where the restrained party has not consented to an extension of the TRO **and no written preliminary injunction order has been issued by the district court**, a party may "reasonably assume" that no valid order exists and act accordingly. *Id.* at 444-445. The



Court further held that for a preliminary injunction to be a valid order from which a contempt order could issue, a district court **must** (1) hold a hearing within the time limit of Rule 65(b) on the issue of whether a preliminary injunction is warranted, **and** (2) issue a written order containing findings of fact and conclusions of law in compliance with Rule 52(a) of the Federal Rules. *Id.* Otherwise, this Court determined that there is no valid injunctive order from which a contempt order can be rendered. *Id.*

*Granny Goose* was a 9-0 decision and the only opinion of this Court which has analyzed and interpreted the time limit on TROs set forth in Rule 65(b). *Id.* at 423. Justice Thurgood Marshall wrote the majority opinion and Chief Justice Rehnquist, then Associate Justice Rehnquist, wrote the only concurrence. Notably, Justice Rehnquist's concurrence was predicated solely on the finding that, " . . . there was no injunctive order in effect at the point in time that respondent's allegedly contemptuous conduct occurred." *Id.* at 445. (App. 62-63).

In the instant proceeding, the Eleventh Circuit affirmed the district court's finding of contempt against Petitioner. The Eleventh Circuit's determination was based on the theory that upon expiration of the TRO, notwithstanding the absence of an order containing findings of fact or conclusions of law, the TRO became an enforceable preliminary injunction. That conclusion directly contradicts the plain language of Rule 65(b) and "overrules" the holding of this Court in *Granny Goose*. In *Granny Goose*, this Court wrote:

> It would be inconsistent with this basic principle to countenance procedures whereby

parties against whom an injunction is directed are left to guess about its intended duration. Rule 65(b) provides that temporary restraining orders expire by their own terms within 10 days of their issuance. Where a court intends to supplant such an order with a preliminary injunction of unlimited duration pending a final decision on the merits or further order of the court, it should issue an order clearly saying so. **And where it has not done so, a party against whom a temporary restraining order has been issued may reasonably assume that the order expired within the time limits imposed by Rule 65(b).** Here, since the only orders entered were a temporary restraining order of limited duration and an order denying a motion to dissolve the temporary order, the Union had no reason to believe that a preliminary injunction of unlimited duration had been issued.

*Id.* at 444-445 [emphasis added]. (App. 61-62).

The Court in *Granny Goose* was determining the correctness of a contempt order issued by a district court for action in violation of a TRO after the time limit set forth in Rule 65(b). Although that is the precise issue in the instant case, the majority for the Eleventh Circuit refused to follow *Granny Goose*. The Court of Appeals wrote:

> We accept that, where there has been no notice to the parties and no hearing on the various factors involved in considering a preliminary injunction, a TRO continued past the Rule 65 limit falls of its own weight. *See Granny Goose v. Brotherhood of Teamsters & Auto Truck Drivers*, 94 S.Ct. 1113 (1974); *Hudson v. Barr*, 3 F.2d 970



> (10th Cir. 1993). In *Granny Goose*, the district court "did not indicate that it was undertaking a hearing on a preliminary injunction." *Granny Goose*, 94 S.Ct. at 1125. And, neither party made an attempt to present its position on whether a preliminary injunction should issue. *Id.*

Opinion at 7, note 7. (App. 6). The Eleventh Circuit, therefore, attempted to distinguish *Granny Goose* from this case on the grounds that a hearing on the preliminary injunction had been held in this case, where such a hearing was not undertaken in *Granny Goose*. However, this Court specifically addressed that issue in *Granny Goose*. In no uncertain terms, this Court held that even if a preliminary injunction hearing is held, a TRO cannot be made into an enforceable preliminary injunction unless a written order containing findings of fact and conclusions of law is issued by the district court. This Court wrote:

> Even were we to assume that the District Court had intended by its June 4 order to grant a preliminary injunction, its intention was not manifested in the appropriate form. **Where a hearing on a preliminary injunction has been held after the issuance of a temporary restraining order, and where the District Court decides to grant the preliminary injunction, the appropriate procedure is not simply to continue in effect the temporary restraining order, but rather to issue a preliminary injunction, accompanied by the necessary findings of fact and conclusions of law.** [note omitted]

*Id.* at 443 [emphasis added]. (App. 60). This Court did not recognize the validity of any injunctive order after the expiration of a TRO unless the order was issued pursuant

to Rule 52(a), *i.e.*, a written order containing findings of fact and conclusions of law.

In the decision below, the Eleventh Circuit relied upon *Sampson v. Murray*, 415 U.S. 61 (1974) (App. 67), to affirm the contempt order against Petitioner. Not only was *Granny Goose* decided two weeks after *Sampson* and therefore stands as controlling precedent, but in *Sampson* this Court was not presented with the consequences of violating an expired TRO as was the case in *Granny Goose*.

In *Sampson*, this Court was primarily concerned with whether injunctive relief was available to the plaintiff, a dismissed federal government worker. The district court granted a TRO preventing her dismissal and ruled that the TRO would extend until the government produced a key witness. The government did not produce the witness and instead went before the Court of Appeals for the District of Columbia to contest the power of the district court to enter injunctive relief when administrative procedures were in place. The Court of Appeals affirmed the district court's granting of injunctive relief and this Court reversed.

The majority of the Court, led by Justice Rehnquist, treated the extended TRO as a preliminary injunction in order to entertain jurisdiction over the case under 28 U.S.C. § 1292(a)(1). *Id.* at 62-92. The majority addressed the merits of the plaintiff's claim for injunctive relief and concluded that the plaintiff was not entitled to injunctive relief. *Id.*

In Justice Marshall's dissent in *Sampson*, he argued against the appealability of a TRO in any situation and



stated that even if a TRO were appealable as a preliminary injunction, "it should be appealable only for the purposes of holding it invalid for failure to comply with Rule 52(a)." *Id.* at 99 (App. 110). Notably, no Justice in *Sampson* recognized an extended TRO as an enforceable order upon which contempt could issue.

The *Sampson* case is not cited in *Granny Goose*. 415 U.S. 61. Surely Justice Marshall, a dissenter in *Sampson* and author of the majority opinion in *Granny Goose*, would have referred to *Sampson* if the holding in that case were at all relevant to the issues decided in *Granny Goose*. However, he did not. Nevertheless, in the decision below, the Eleventh Circuit stated:

> That a hearing on a preliminary injunction had been held and that appellate review was, therefore, available under *Sampson*, makes this case materially different from *Granny Goose*. Even in *Pan American World Airways, Inc. v. Flight Engineers' Int'l Assn.*, 306 F.2d 840, 842 (2d Cir. 1962), the Second Circuit treated a TRO extended following the commencement of a hearing on the merits as a preliminary injunction for purposes of appeal. No good reason exists to limit this rule to one of appellate jurisdiction only: a preliminary injunction is a preliminary injunction.

Opinion at 8, note 8. (App. 6).

The above conclusions are a refusal by the Eleventh Circuit to follow the clear enunciation of the governing rule of law set forth in *Granny Goose*. First, it took this

Court's limited appellate treatment of a TRO as a preliminary injunction in order to entertain jurisdiction in *Sampson*, and expanded the holding to the extent that a TRO extended beyond twenty days may automatically become an enforceable preliminary injunction. However, that was not the holding in *Sampson* and directly contradicts this Court's holding in *Granny Goose*.

*Granny Goose* determined that no preliminary injunction exists after twenty days from the date of issuance of a TRO, unless specified by a written injunctive order containing findings of fact and conclusions of law. The fact that the trial judge in this case orally ordered an indefinite extension of the TRO does not change the application of *Granny Goose*, but, in fact, violates its clear holding. The Court enunciated the prerequisites for a valid order and the trial judge in this case failed to meet those criteria. The trial judge did not have the power to extend the TRO past twenty days without the consent of the restrained party and, in attempting to do so in this case, exceeded his legal authority. This Court foresaw such a situation in *Granny Goose* and held that without a written order a restrained party may "reasonably assume" no valid order exists and act accordingly.

The Eleventh Circuit argued in the decision below that appellate review was the only proper action for Petitioner to take in this case. Yet, in *Granny Goose*, the restrained party did not seek appellate review of the extended TRO, but rather proceeded with actions which were in violation of the original TRO. This Court did not take issue with that conduct. On the contrary, the Court held that one may "reasonably assume" there is no valid



order after twenty days and the parties may act accordingly. Thereupon, this Court upheld the reversal of the contempt order.

Thus, the Eleventh Circuit's reliance on (1) the appellate treatment of a TRO as a preliminary injunction, and (2) the holding of a preliminary injunction hearing, as grounds for a TRO becoming a full fledged preliminary injunction, directly contradicts this Court's interpretation of Rule 65(b) in *Granny Goose* and must be reversed.

Neither the courts of appeals nor the district courts have the power to refuse to follow Rule 65(b), a Congressional enactment. Rule 65(b) is clear. *Granny Goose* is clear. A district court cannot extend a TRO beyond twenty days without requesting and receiving the consent of the restrained party. If a district court seeks to continue the effect of the TRO beyond the twenty days without consent, the district court is not only obligated to hold a preliminary injunction hearing, but must issue a written preliminary injunction containing findings of fact and conclusions of law.

The concurring judge below noted the danger inherent in Eleventh Circuit's ruling. He wrote, "[i]f a TRO can metamorphose into a preliminary injunction by the expiration of the very time limits imposed as safeguards against the indefinite restraint over one's property, then Rule 65(b) provides no protection at all." Slip decision, concurring opinion, pages 9-10. (App. 17-18). Yet, this metamorphosis has now been authorized by the decision of the Eleventh Circuit in this case.

This Court should review this decision and determine whether a TRO becomes an enforceable preliminary injunction upon its expiration under Rule 65(b).

## CONCLUSION

Ours is "[a] government of laws, not men."[1] The law in this case is expressed in Rule 65(b) and this Court's decision in *Granny Goose*. That law provides that a TRO expires after twenty days unless prior to that date the restrained party consents to an extension or there has been a written order by the trial judge converting the TRO into a preliminary injunction. Otherwise, the law provides that there is no valid order. A trial judge cannot disregard the law.

The Eleventh Circuit's opinion flatly refused to follow the clear language of both Rule 65(b) and this Court's holding in *Granny Goose*, resulting in affirmance of the contempt order issued by the trial judge. When the same situation was presented to this Court in *Granny Goose*, this Court affirmed the reversal of the trial judge's contempt order. The inconsistency created by the Eleventh Circuit's decision casts doubt upon the property rights of all civil litigants before the federal courts, especially in the countless government injunctive actions before the district courts.

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[1] John Adams, "Novanglus" papers, Boston Gazette [1774], no. 7. Incorporated [1780] in the Massachusetts Constitution. Words credited to James Harrington [1611-1677].



Pursuant to Rule 10 of the Supreme Court Rules, this Court has discretion to review the Eleventh Circuit's decision because it decided an important federal question in a way that conflicts with relevant decisions of this Court, i.e., *Granny Goose*.

For all the reasons stated, Petitioner, Law Practice of J.B. Grossman, P.A., prays that this Court grant a Writ of Certiorari to review the decision of the Eleventh Circuit Court of Appeals.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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No. 95-4391

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D. C. Docket No. 94-8256-CIV-SH

DAVID LEVINE,

Receiver-Appellee,

SECURITIES EXCHANGE COMMISSION,

Plaintiff-Appellee,

versus

COMCOA LTD., a/k/a Comcoa Ltd.,
THOMAS W. BERGER,

Defendants,

J. B. GROSSMAN, Law Practice,

Movant-Appellant,

SUN-SENTINEL COMPANY, MOBITEL SERVICES CORP., a Delaware Corporation, et al.,

Claimants.

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Appeal from the United States District Court
for the Southern District of Florida

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(December 1, 1995)

Before EDMONDSON, Circuit Judge, and HILL, Senior Circuit Judge, and MILLS*, District Judge.

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* Honorable Richard Mills, U.S. District Judge for the Central District of Illinois, sitting by designation.

EDMONDSON, Circuit Judge:

Law Practice of J.B. Grossman, P.A., appeals the district court's finding of contempt for its transfer of funds from the trust account of its client, Comcoa Ltd. ("Comcoa"), to the law firm's operating account in violation of a court order. We affirm.

Before January 1994, Comcoa retained J.B. Grossman as counsel.[1] In mid-January 1994, Grossman told Comcoa to establish a large retainer fee to assure Grossman's availability in the event of an asset-freezing action. This retainer was placed in a trust account maintained by Grossman on behalf of Comcoa. Before April 1994, the Division of Enforcement of the Securities and Exchange Commission ("Division") began an informal inquiry into the business activities of Comcoa.

On 5 May 1994, the Division filed an *ex parte* Motion for Order to Show Cause Why a Preliminary Injunction Should Not Be Granted, Temporary Restraining Order ("TRO"), Order Freezing Assets, Order Appointing Receiver, Order for an Accounting, Order Prohibiting Destruction of Documents and an Order Expediting Discovery. On 6 May 1994, at 9:25 AM, a United States District Judge entered an order, among other things, granting a TRO and freezing Comcoa's assets, appointing

[1] While it is appellant Law Practice of J.B. Grossman, P.A. which was held in contempt below, the law firm's sole involvement in this case was through the actions of J.B. Grossman, a lawyer. As such, this opinion will describe the behavior in this case as being that of Mr. Grossman rather than that of the law firm.



a Receiver, and notifying the parties of a hearing on 16 May to consider a preliminary injunction.[2]

On 11 May Comcoa filed, among other things, an Emergency Motion to Vacate the TRO, a Motion to Dismiss for Lack of Subject Matter Jurisdiction and a Motion for Preliminary Hearing on Defendants' Motion to Dismiss.

On 16 and 17 May the district court did hold a *preliminary injunction hearing* and also heard Defendants on their Motion to Dismiss for Lack of Subject Matter Jurisdiction. Grossman was attorney of record for Comcoa at this hearing. Over the two days, the district judge heard argument from counsel and received testimony from seven witnesses; the hearing was completed.[3] At the end of the hearing on 17 May, the district court told both parties that it was extending the 6 May order until the court ruled on the substantive motions by Defendants. The district court said the order would be extended in all respects and specifically said the order included the asset freeze. The district court then asked if either party had anything further or any questions. Grossman replied, "No, sir."

On 6 June 1994, Grossman called the district court to find out if an order had been issued. At first, Grossman was told a preliminary injunction had been issued; but

[2] The May 6 order stated that the hearing on May 16 was to show cause "why a Preliminary Injunction . . . should not be granted. . . . "

[3] Mr. Grossman makes no contention that he was unable at this hearing to set forth fully the reasons for which he and Comcoa believed no preliminary injunction should issue.

later the district court's assistant said a preliminary injunction had not been issued. Grossman considered the court's order to have expired. And he, on 6 June, transferred from Comcoa's trust account about $92,000 of the retainer funds into his law firm's operating account.[4] About this same time, he filed for Comcoa an Emergency Motion for Release of Assets, based on the expiration of the TRO.[5] Also on 7 June, the district court entered an Order of Preliminary injunction *nunc pro tunc* to June 3, 1994; and, the district court denied Defendants' Emergency Motion.

In August 1994, the Division filed a Motion for an Order to Show Cause to hold Grossman in contempt for violating the district court orders when he transferred the

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[4] The order stated that Comcoa and their "attorneys . . . are [ ]restrained from, directly or indirectly, transferring . . . any assets or property owned by, controlled by, or in the possession of [Comcoa]". In the contempt proceeding the court below concluded that the asset freeze extended to the trust account, and this determination is not in dispute. Never does Grossman contend that he was unaware that the order of the court, if still in force, prohibited this conduct.

[5] Some confusion exists on the precise sequence of events on June 6 and 7. The district court appears to have found that Grossman first filed the motion for release of funds and then – before the motion could be decided – transferred the money. Grossman's initial brief says that he transferred the funds on 6 June and filed the motion for release of assets the next day. His reply brief says that the motion was filed 6 June, the same day that he transferred the funds, but later in the day. And, the docket sheet indicates the motion was not filed until 7 June. In any event, what is undisputed is that Grossman's transfer of funds was a unilateral act done without the approval of any court.



retainer funds. The district court entered an order holding Grossman in contempt of court for his transferring of the funds into his own account. He now appeals this ruling.

Rule 65 of the Federal Rules of Civil Procedure says that a TRO can last only 10 days, unless extended, and cannot be extended beyond 20 days without the consent of the restrained party.[6] Grossman says that he never consented to an extension; and for the sake of our discussion, we accept that he did not consent.

The Supreme Court has said a TRO that is continued beyond the time permissible under Rule 65 should be treated as a preliminary injunction. *See Sampson v. Murray*, 94 S.Ct. 937, 951 (1974) (stating "[w]here an adversary hearing has been held, and the court's basis for issuing the order strongly challenged, classification of the potentially unlimited order as a temporary restraining order seems particularly unjustified"). This treatment is especially appropriate where, as in this case, there has been notice to the parties, a full hearing on a preliminary injunction, and then a stated and clear decision from the bench to extend

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[6] The parties argue whether the initial 10 days and the 20 day extension should be calculated by excluding weekends and holidays. This argument is largely irrelevant because even if we take the calculation which excludes weekends and holidays, the TRO would expire at 9:25 AM on June 6. And, because the district court did not enter the written preliminary injunction order until June 7 (although it was entered *nunc pro tunc* to June 3), the TRO would have expired unless consent were given. We do note that even under the calendar day approach, continuing the hearing into the second day constituted a for-cause extension of the initial 10 day period.

the terms of the restraining order indefinitely, that is, until the court notified the parties otherwise.[7]

Very likely, Grossman's client, Comcoa along with its agents and attorneys, was under a preliminary injunction once the judge spoke at the end of the hearing; but we need not go that far. If the TRO had not become a preliminary injunction before, it became a preliminary injunction when the TRO, as orally extended by the district court, went beyond the time permissible under Rule 65. Thus, the proper course of conduct for Grossman was to treat the TRO as an erroneously granted preliminary injunction and to appeal.[8] *See Clements Wire & Mfg. Co. v. NLRB*, 589 F.2d 894, 896 (5th Cir. 1979).

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[7] We accept that, where there has been no notice to the parties and no hearing on the various factors involved in considering a preliminary injunction, a TRO continued past the Rule 65 limit falls of its own weight. *See Granny Goose v. Brotherhood of Teamsters & Auto Truck Drivers*, 94 S.Ct. 1113 (1974); *Hudson v. Barr*, 3 F.3d 970 (10th Cir. 1993). In *Granny Goose*, the district court "did not indicate that it was undertaking a hearing on a preliminary injunction." *Granny Goose*, 94 S.Ct. at 1125. And, neither party made an attempt to present its position on whether a preliminary injunction should issue. *Id.*

[8] That a hearing on a preliminary injunction had been held and that appellate review was, therefore, available under *Sampson*, makes this case materially different from *Granny Goose*. Even in *Pan American World Airways, Inc. v. Flight Engineers' Int'l Assn.*, 306 F.2d 840, 842 (2d Cir. 1962), the Second Circuit treated a TRO extended following the commencement of a hearing on the merits as a preliminary injunction for purposes of appeal. No good reason exists to limit this rule to one of appellate jurisdiction only: a preliminary injunction is a preliminary injunction.



We believe the instances when lawyers can be told by the district court in no uncertain terms not to do "X" and, yet, the lawyer can go on to do "X" with impunity are (and ought to be) few and far between, especially where the appellate courts – as in this case – are open to the lawyer to settle the matter in an orderly way, but the lawyer pursues no appeal. In these circumstances, for Grossman just to disregard the district court's clear order, based on his personal belief that it was invalid, was not merely bold; it was bad. We conclude his conduct warrants a determination of contempt.[9] The district court was

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Two concerns about TROs are reflected in the case law and in Rule 65. First, restrained parties often have no opportunity for a hearing and may not know precisely what conduct is prohibited. Second, a restrained party may not obtain appellate review of a TRO.

Our holding respects both these concerns; Grossman and Grossman's client had the opportunity to contest the preliminary injunction (and had precise notice of the enjoined conduct) and also could have obtained appellate review of the injunction.

[9] Although we decide this case under Rule 65, we do *not* decide that all of the district courts' power to give binding orders to a lawyer and all of a lawyer's legal duties to obey the orders of a court with subject-matter jurisdiction over the controversy in which the lawyer appears as counsel of record flow from the Federal Rules of Civil Procedure only.

We are heartsick when we observe that Mr. Grossman, an officer of the United States' Courts, acted personally and directly in disobeying the straightforward instruction of a United States District Judge and did so just for money, his fee.

This case is not one in which a lawyer's client acted, and because the lawyer did not stop his client, the lawyer is facing contempt. Mr. Grossman, himself, acted contrary to plain instructions given to him when he was face-to-face with the

within its discretion to hold Grossman in contempt of court for violating its order.

The order of contempt against the Law Practice of J.B. Grossman, P.A., is AFFIRMED.

HILL, Senior Circuit Judge, concurring, *dubitante*:

The court today affirms contempt sanctions against a lawyer for doing what he knew the judge had ordered him not to do. I am not attracted to this lawyer's conduct. The problem arose, however, because the party who petitioned for and obtained the TRO stood silent while the order inadvertently expired without counselling the court of the requirements for its extension. One would expect more from the agency appearing here. It has obtained

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court. In such circumstances, the power of district courts to discipline their officers may possibly be considerably broader-based than that granted by Rule 65 or even the Federal Rules of Civil Procedure generally. Put differently, whether or not the client Comcoa was still validly restrained about its funds, perhaps Mr. Grossman, as an officer of the court, remained under a valid restraint. But given the way this controversy was decided by the district court and has been briefed and argued to us, we will pass over the question of Mr. Grossman's professional responsibilities and of the district court's inherent powers to supervise and to discipline its subordinate officers.



temporary restraint before.[1] I am not pleased with the performance of *any* of our cast of characters.

An *ex parte* temporary restraining order is an extreme remedy to be used only with the utmost caution. Rule 65(b) of the Federal Rules of Civil Procedure imposes strict restrictions on its scope and specific time constraints for its duration:

> Every temporary restraining order granted without notice . . . shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period.[2]

Fed. R. Civ. P. 65(b).

The importance of these restrictions was emphasized by the Supreme Court in *Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers, Local No. 70,*

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[1] An electronic search using only the words "Securities and Exchange Commission" and "temporary restraining order" or "TRO" yielded 11,541 cases. We are not suggesting that *all* these cases are similar to the instant situation, nor are we implying we have read each case. We would suggest that counsel representing the SEC are likely to have explored the requirements for effective extension of TROs from time to time.

[2] The district court found that Grossman consented to the extension of the TRO. The majority opinion, however, accepts without comment Grossman's contention that he did not. I concur in this conclusion and note that, if Grossman had consented to the extension, the TRO would have remained an unappealable interlocutory order. *Fernandez-Roque v. Smith*, 671 F.2d 426, 430 (11th Cir. 1982).

415 U.S. 423 (1974). In *Granny Goose*, a state court issued a temporary restraining order to enjoin the local union from striking. Two days later, the case was removed to federal court. The union moved to dissolve the restraining order. After a hearing, the court denied the union's motion. The union went on strike some months later. The district court held the union in contempt for violating the TRO. The Ninth Circuit reversed, and the Supreme Court affirmed the appellate court.

The Court held that the union violated no order when it resumed its strike because no order was in effect at that time. The Court rejected the employer's argument that the district court's hearing on the union's motion to dissolve the restraining order was a hearing on a preliminary injunction, or that its order denying the motion should be construed as a grant of a preliminary injunction. Regardless of the district court's intent in the hearing, the TRO did not survive the expiration of the Rule 65(b) time limits because the district court did not follow the appropriate procedure. The Supreme Court held:

> Where a hearing on a preliminary injunction has been held after issuance of a temporary restraining order, and where the District Court decides to grant the preliminary injunction, the appropriate procedure is not simply to continue in effect the temporary restraining order, but rather to issue a preliminary injunction, *accompanied by the necessary findings of fact and conclusions of law.*

415 U.S. at 443 (emphasis added); *see also Hudson v. Barr*, 3 F.3d 970, 975 (6th Cir. 1993) (indefinite continuation of



TRO held improper; government's consent to TRO, pending hearing on motion for preliminary injunction, ended on day hearing was supposed to occur); Fed. R. Civ. P. 52(a) (" . . . and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action.").

Our panel's opinion today purports to accept *Granny Goose* but characterizes its holding as " . . . where there has been no notice to the parties and no hearing on the various factors involved in considering a preliminary injunction, a TRO continued past the Rule 65 limit falls of its own weight." This interpretation reads out of Rule 65(b) any requirement for *consent* to validate any extension of a TRO beyond the twenty-day limit. *See Connell v. Dullen Steel Products, Inc.*, 240 F.2d 414, 417 (5th Cir. 1957). Under the Rules, it is not just notice and a hearing that allows a TRO to become a preliminary injunction, but findings of fact and conclusions of law which *adjudicate the property right involved* thereby satisfying due process.

*Granny Goose* also emphasizes the safeguards built into Rule 65 to prevent the serious penalties imposed when one is found to be in contempt for violating court injunctions.

> [O]ne basic principle built into Rule 65 is that those against whom an injunction is issued should receive fair and precisely drawn notice of what the injunction actually prohibits.
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> • • •
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> It would be inconsistent with this basic principle to countenance procedures whereby parties

> against whom an injunction is directed are left to guess about its intended duration. Rule 65(b) provides that temporary restraining orders expire by their own terms within 10 days of their issuance. Where a court intends to supplant such an order with a preliminary injunction of unlimited duration pending a final decision on the merits or further order of the court, it should issue an order clearly saying so. And where it has not done so, *a party against whom a temporary restraining order has issued may reasonably assume that the order has expired within the time limits imposed by Rule 65(b).*

415 U.S. at 444-45 (emphasis added) (footnote omitted).

No case is cited to us in which the imposition of contempt for violation of an indefinitely-extended TRO has been upheld. Nevertheless, we hold today that "[f]or Grossman just to disregard the district court's order based on his personal belief that it was invalid, is conduct that warrants a determination of contempt." I do not concur in this, but I do not view it as a basis for the judgment. The opinion seems to say that, notwithstanding *Granny Goose*, it was not "reasonable" for Grossman to assume that the TRO had expired as Rule 65(b) prescribes.[3]

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[3] I believe that this conclusion denies Grossman the benefit of that to which he is entitled under *Granny Goose*. Rule 65(b) is clear that no TRO may be extended beyond the twenty days without the consent of the party restrained. On May 27, 1994, after the expiration of twenty calendar days, Grossman requested the return of some of his client's funds from the Receiver who had custody of them. The Receiver disagreed about the calculation of time, stating that the time would expire on June 1. On June 3, Grossman inquired of the district court whether a preliminary injunction had issued. The staff advised that no order had been issued. On June 6, Grossman again inquired of the Clerk of Court and of the district court's chambers whether any injunction had issued. Informed that no order had issued nor was any order forthcoming, Grossman transferred his client's retainer from a trust fund to Grossman's law firm operating account in partial payment of his fees. As far as the record reveals, Grossman did what Rule 65(b) permitted him to do, and as his client instructed him to do with the client's funds.



This holding is based upon *Sampson v. Murray*, 415 U.S. 61 (1974). In *Sampson*, a government employee sought a temporary injunction against her dismissal from employment as a probationary employee. The district court granted a temporary restraining order. Later, after an adversary hearing at which the government declined to produce the discharging official as a witness to testify as to the reasons for the dismissal, the district court ordered the temporary restraint continued until the witness appeared. In considering the issue of appellate jurisdiction over the order the Supreme Court wrote:

> A district court, if it were able to shield its orders from appellate review merely by designating them as temporary restraining orders, rather than as preliminary injunctions would have virtually unlimited authority over the parties in an injunctive proceeding. In this case, where an adversary hearing has been held, and the court's basis for issuing the order strongly challenged, classification of the potentially unlimited order as a temporary restraining order seems particularly unjustified. Therefore,

> we view the order at issue here as a preliminary injunction.

*Id.* at 87-88.

An order extending a TRO beyond the statutory twenty-day limit, therefore, is treated as a preliminary injunction. One might well conclude that the conversion of an indefinitely-extended TRO into a preliminary injunction would be for purposes of appeal only, conferring jurisdiction on the court of appeals for the sole purpose of voiding the invalidly extended TRO.[4]

This was exactly the approach of the Court of Appeals for the District of Columbia Circuit in *National Mediation Bd. v. Air Line Pilots Association, Int.*, 323 F.2d 305 (D.C. Cir. 1963). In that pre-*Sampson* case, the Court of Appeals held that an order extending a TRO beyond the twenty days allowed by Rule 65(b) is tantamount to the grant of a preliminary injunction, thus conferring jurisdiction on the court of appeals. The court further held, however, that since the restraining order was not supported by findings of fact and conclusions of law as required by Rule 55(a), it was not a valid preliminary injunction and remanded the case to the district court with directions to dissolve the void order. *Id.* at 305-06.[5]

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[4] As noted earlier, until today there has never been a case affirming sanctions for contempt for violation of an indefinitely-extended TRO.

[5] An earlier approach adopted by two circuits upon finding that temporary restraining orders had expired by virtue of the Rule 65(b) limitations, was to hold that there was no existing order to review and dismiss the appeals as moot. *Benitez v. Anciani*, 127 F.2d 121 (1st Cir. 1942), *cert. denied*, 317 U.S. 699 (1943) and *Southard & Co. v. Salinger*, 117 F.2d 194 (7th Cir. 1941).

Subsequent courts have distinguished these cases where, as here, a district court has ordered an indefinite extension of the TRO. *See Pan American World Airways, Inc. v. Flight Engineers' Int'l Ass'n*, 306 F.2d 840, 842 (2d Cir. 1962) ("In the present case, because the district judge extended the order beyond the twenty day period, we consider that the temporary restraining order became an appealable preliminary injunction.").



This result was later endorsed by Justice Marshall in his dissent in *Sampson*. In *Sampson*, the Supreme Court went beyond the mere exercise of appellee jurisdiction and considered the *merits* of the application for a preliminary injunction. This appeared to be a significant extension to Justice Marshall who wrote:

> It is suggested that if an indefinitely extended temporary restraining order remained unappealable, the District Court would have virtually unlimited authority over the parties in an injunctive action. At the outset, this cannot justify this Court' reaching the merits of Mrs. Murray's claim for a preliminary injunction. Even if the order entered by the District Court is appealable, it should be appealable only for the purposes of holding it invalid for failure to comply with Rule 52(a). This was the precise course taken by the Court of Appeals for the District of Columbia Circuit in *National Mediation Board, supra*, on which the majority relies.
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> * * *
>
> Here, instead, we find the Supreme Court determining that although the District Court had jurisdiction to grant injunctive relief, the equities of Mrs. Murray's case did not support a

> preliminary injunction, when neither the District Court nor the Court of Appeals has yet confronted the latter issue. I do not believe this makes for sound law.

*Sampson*, 415 U.S. at 957 (footnote omitted).

I recognize that this reasoning was rejected by the Court in *Sampson*.

Justice Rehnquist, for the Court, wrote:

> Our Brother Marshall, in his dissenting opinion, nevertheless suggests that a district court can totally or partially impede review of an indefinite injunctive order by failing to make any findings of fact or conclusions of law. It would seem to be a consequence of this reasoning that an order which neglects to comply with one rule may be saved from the normal appellate review by its failure to comply with still another rule. We do not find this logic convincing. Admittedly, the District Court did not comply with Fed. Rule Civ. Proc. 52(a), but we do not think that we are thereby foreclosed from examining the record to determine if sufficient allegations or sufficient evidence supported the issuance of injunctive relief.

*Id.* at 951 n. 59.

By reviewing the merits, the Supreme Court appears to have held that the TRO *cum* preliminary injunction is a valid restraining order. Otherwise, the review on the merits would be a mere intellectual exercise which the



Court is not wont to do.[6] So, I am instructed by the Court that the indefinite extension of a TRO not only transforms the TRO into a preliminary injunction for purposes of appeal, but also into a valid injunction.[7]

Clearly, some problems emerge. We uphold the contempt imposed for violation of an expired TRO in this case at the expense of making unclear the duration of emergency orders that deprive a party of the free use of his or her property. This is not appealing in a free society. Furthermore, we eviscerate the protection afforded by Rule 65(b). If a TRO can metamorphose into a preliminary

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[6] Upon review of the merits, the Court analyzed whether petitioner had adequately demonstrated the irreparable harm necessary to secure injunctive relief, concluded that she had not done so. Therefore, although *valid*, the Court found the TRO *unlawful* in that it was incorrectly granted. The Court reversed the decision of the court of appeals which had upheld the district court's grant of the TRO.

[7] This determination is part of what is required in order for this court to uphold the contempt imposed upon Grossman in this case. Unlike criminal contempt, civil contempt may be upheld only if the disobeyed order was *valid and lawful*. *Smith v. Sullivan*, 611 F.2d 1050, 1052-54 (5th Cir. 1980).

Having been persuaded that the indefinitely extended TRO becomes a valid preliminary injunction, the second step would be to consider the injunction on the merits to determine whether it was granted according to law, *i.e.*, whether the applicant demonstrated the requisite irreparable harm and inadequate legal remedies.

In this case, however, Grossman does not appear to challenge the injunction on its merits, choosing to argue only that the TRO was void after the expiration of the statutory time limits. Therefore, my inquiry is limited to the validity of the order disobeyed.

injunction by the expiration of the very time limits imposed as safeguards against the indefinite restraint over one's property, then Rule 65(b) provides no protection at all.[8] As the Second Circuit has observed:

> It is because the remedy is so drastic and may have such adverse consequences that the authority to issue temporary restraining orders is carefully hedged in Rule 65(b) by protective provisions. And the most important of these protective provisions is the limitation on the time during which such an order can continue to be effective.

*Pan American World Airways, Inc. v. Flight Engineers' Int'l Ass'n*, 306 F.2d 840, 843 (2d Cir. 1962) (holding, however, that a TRO indefinitely extended by a district court becomes a preliminary injunction so that it may be reviewed).

I confess to a temptation to conclude that *Sampson* is overruled by *Granny Goose*, or that, at least, because the restraint imposed to *Sampson* was found to be unlawful, the implications from the merits review are dicta. I do not undertake, however, to limit Supreme Court precedent. If our reading of *Sampson* is correct, it requires that, for the first time, we affirm a contempt imposed for violating a TRO extended beyond the statute's limit.

Not without doubt as to this conclusion. **I CONCUR.**

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[8] This approach does, however, have the virtue of easing the burden on over-worked district judges. It appears that now they may avoid the time-consuming chore of finding facts and making conclusions of law, and simply allow the passage of time to accomplish what many cases say they may not do – turn a TRO into a preliminary injunction without going to this trouble.

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**IN THE UNITED STATES COURT OF APPEALS**

**FOR THE ELEVENTH CIRCUIT**

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No. 95-4391

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DAVID LEVINE,

Receiver-Appellee,

SECURITIES EXCHANGE COMMISSION,

Plaintiff-Appellee,

versus,

COMCOA LTD., a/k/a Comcoa Ltd,
THOMAS W. BERGER,

Defendants,

J.B. GROSSMAN, Law Practice,

Movant-Appellant,

SUN-SENTINEL COMPANY,
MOBITEL SERVICES CORP.,
a Delaware Corporation, et al.,

Claimants.

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On Appeal from the United States
District Court for the Southern District of Florida

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(Filed Feb. 15 1996)

BEFORE: EDMONDSON, Circuit Judge, and HILL, Senior Circuit Judge, and MILLS*, District Judge.

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* Honorable Richard Mills, U.S. District Judge for the Central District of Illinois, sitting by designation.

PER CURIAM:

The petition(s) for rehearing filed by J.B. GROSSMAN, Law Practice, is denied.

ENTERED FOR THE COURT:

/s/ J. L. Edmondson
UNITED STATES CIRCUIT JUDGE

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**

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No. 95-4391

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DAVID LEVINE,
Receiver-Appellee,

SECURITIES EXCHANGE COMMISSION,
Plaintiff-Appellee,

versus,

COMCOA LTD., a/k/a Comcoa Ltd,
THOMAS W. BERGER,
Defendants,

J.B. GROSSMAN, Law Practice,
Movant-Appellant,

SUN-SENTINEL COMPANY,
MOBITEL SERVICES CORP.,
a Delaware Corporation, et al.,
Claimants.

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On Appeal from the United States
District Court for the [sic] District of [sic]

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC (Opinion _____, 11th Cir., 19__, ___ F.2d _____).

(Filed Feb. 15 1996)

Before: EDMONDSON, Circuit Judge, and HILL, Senior Circuit Judge, and MILLS*, District Judge.

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* Honorable Richard Mills, U.S. District Judge for the Central District of Illinois, sitting by designation.

PER CURIAM:

The petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ J. L. Edmondson
UNITED STATES CIRCUIT JUDGE

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**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**

Case No. 94-8256-CIV-HIGHSMITH

SECURITIES & EXCHANGE COMMISSION,

Plaintiff,

vs.

COMCOA LTD., a/k/a COMCOA LTD., INC., and THOMAS W. BERGER,

Defendants.
_____/

**ORDER**

(Filed Mar. 13, 1995)

This cause came before the Court for a show cause hearing on February 27, 1995, to determine whether the Law Offices of J.B. Grossman ("Grossman") should be held in contempt of Court for violation of a temporary restraining order ("TRO") entered in the above-styled action; and also upon Grossman's Motion for Clarification, filed November 4, 1994.

BACKGROUND

On May 6, 1994, a temporary restraining order was entered in the above-styled action which, *inter alia*, restrained the defendants and their agents, including their attorneys, from either "directly or indirectly transferring, setting off, receiving, changing, selling, pledging,

assigning, liquidating or otherwise disposing of, or withdrawing any assets or property owned or controlled by the defendants." On May 16 and 17, 1994, the Court held a preliminary injunction hearing. At that hearing, the Court also considered the defendants' various pending motions, including their motion to dismiss for lack of subject matter jurisdiction and motion to vacate TRO.

At the time of the entry of the TRO, Grossman, counsel for the defendants, held $105,100.00 in a trust account on behalf of the defendants. Pursuant to the terms of the retainer agreement between Grossman and the defendants, the funds in this account would become nonrefundable upon the institution of an SEC enforcement action against the defendants.

At the hearing, the Court determined that the TRO would remain in effect until further order of the Court. Specifically, the Court stated that: "The status quo remains until I rule on the substantive motion, which I will, I will rule now on the substantive motion to dismiss for lack of subject matter jurisdiction, and depending upon that ruling, I will then rule upon the request for preliminary injunction as either moot, not warranted, or warranted. All right? Do you have anything further, questions that is?" At this point, Grossman responded "No sir." At no time did Grossman raise any objections or concerns with regard to the extension of the TRO.

On June 3, 1994, the Court issued its ruling on the defendants' various pending motions, including the motion to dismiss and the motion to vacate the TRO. All the defendants' motions were denied. Thereafter, on June



7, 1994, the Court issued an order of preliminary injunction. The preliminary injunction was dated "nunc pro tunc" to June 3, 1994, to correspond with the entry of the omnibus order of that date.[1]

On June 6, 1994, Grossman filed an emergency motion for release of funds. On that same day, instead of awaiting the Court's ruling on his emergency motion, Grossman transferred $91,500.00 out of the defendants' trust account and into an operating account held by the law firm, in satisfaction of the defendants' outstanding bill for Grossman's legal services; i.e., for costs incurred.[2] Thereafter, the SEC filed its motion for an order to show cause why Grossman should not be held in contempt of court for violating the Court's May 6, 1994, TRO and "subsequent orders effectively extending it."

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[1] While Grossman takes issue with respect to the propriety of the Court's *nunc pro tunc* dating of the preliminary injunction, the Court need not reach this issue as it is beyond the scope of the show cause hearing; namely, whether Grossman violated the TRO.

[2] The SEC maintains that the actual amount held in the retainer account at the onset of this action and then subsequently transferred to the law firm's operating account is $106,000.00. At the show cause hearing on this matter, Grossman testified that only $91,500.00 was transferred, and that the remainder, approximately $3,600.00, is still being held in the defendants' trust account. The Court finds that $91,500.00 is the correct amount in dispute, and that the remaining $3,600.00 is unquestionably subject to disgorgement to the Receiver.

## DISCUSSION

The principal purpose of the federal securities laws is to protect investors by requiring the full disclosure of information material to investment decisions, by compensating defrauded investors, and by deterring fraud and manipulative practices. *Randall v. Loftsgaarden*, 478 U.S. 647, 664 (1986). Because these laws are remedial in nature, they are to be liberally construed. *Craighead v. E.F. Hutton & Co.*, 899 F.2d 485, 493 (6th Cir. 1990); *Castleglen, Inc. v. Commonwealth Sav. Ass'n*, 689 F. Supp. 1069, 1072 (D. Utah 1988). In an SEC enforcement action, the district court has the authority, through its equitable jurisdiction, to fashion an appropriate remedy on a proper showing of a securities violation. *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1103 (2d Cir. 1972). The ultimate remedies available to the court include disgorgement, restitution, and rescission. *SEC v. Current Financial Servs., Inc.*, 783 F. Supp. 1441, 1443 (D.D.C. 1992). To preserve a basis for such remedies, the district court may impose an interim asset freeze. *CFTC v. American Metals Exchange Corp.*, 991 F.2d 71, 79 (3d Cir. 1993); *SEC v. Unifund SAL*, 910 F.2d 1028, 1041 (2d Cir. 1990).

In imposing a freeze of assets, there is no requirement that the court exempt sufficient assets for the payment of legal fees. *See SEC v. Cherif*, 933 F.2d 403, 416-17 (7th Cir. 1991), *cert. denied*, 502 U.S. 1071 (1992). Indeed, the use of frozen assets for attorney's fees has been disallowed in circumstances more extreme than in the instant case. *See, e.g., Caplin & Drysdale Chartered v. United States*, 491 U.S. 617 (1989) (criminal forfeiture statute) (defendant paid attorney $25,000.00 in violation of restraining order); *United States v. Monsanto*, 491 U.S. 600



(1989) (criminal forfeiture statute) (defendant's motion to vacate restraining order to permit use of frozen assets to retain attorney denied); *United States v. One Residential Property Located at 501 Rimini Road*, 733 F. Supp. 1382 (S.D. Cal. 1990) (civil forfeiture statute) (no constitutional right to civilly forfeitable assets for payment of legal fees). Moreover, in other contexts, attorneys have been required to disgorge nonrefundable retainers. *See, e.g., In re Mondie Forge Co.*, 154 B.R. 232, 239 (N.D. Ohio 1993) (bankruptcy case); *United States v. Harvey*, 814 F.2d 905, 913, 918 (4th Cir. 1987) (RICO/CCE action). In all of these cases, the courts have essentially held that a defendant has no right to spend another's money for services rendered by an attorney, even if those funds are the only way that the defendant will be able to retain counsel of his choice. *See Property Located at 501 Rimini Road*, 733 F. Supp. at 1386 (quoting *Caplin & Drysdale*, 109 S. Ct. at 2652). The reasoning of these cases has been extended to SEC enforcement actions. *See, e.g., Cherif*, 933 F.2d at 416-17.

In this case, the Court imposed an asset freeze on May 5, 1994. Subject to that freeze was the trust account maintained by Grossman on behalf of the defendants. Grossman contends that at the moment of the freeze, the law firm garnered title to the funds in that account. Hence, the Court must first determine who has the superior interest in the funds, thereby establishing whether the funds were subject to the TRO.

1. The Nonrefundable Retainer Account.

Grossman contends that "the representation agreement and retainer the law firm fashioned for the Defendants was based on the firm's experience, business judgment and what may be needed to meet the clients' instructions to defend their rights in an asset freezing action," because, "[i]n its experience, the law firm has found that regulatory agencies move quickly and without notice in many circumstances involving telecommunications and securities questions." By example, Grossman cites to its experience with an on-going, unrelated SEC action, *FTC v. Metropolitan Communications, et al.*, 94-CIV-0142-(JFK) (SDNY).

It is a well-founded principle of contract construction that an instrument shall be construed most strongly against its draftsman. *See United States v. Seckinger*, 397 U.S. 203, 210 (1970). In this regard, given Grossman's vast experience with the securities laws, the Court finds that, without a doubt, Grossman drafted the retainer agreement with the intention of circumventing federal securities laws.[3] By drafting the retainer agreement in such a fashion as here, Grossman has protected its own economic interests at the expense of others. Indeed, to uphold this type of retainer agreement would not only

[3] Indeed, the Court finds that Grossman is well-versed in the ways of SEC enforcement of the federal securities laws. The law firm has represented several telecommunications/securities clients other than the defendants in the instant case. And J.B. Grossman, himself, has over 21 years legal experience, including serving as a Commodity Futures Trading Commission attorney and also as special counsel for the New York Stock Exchange.



render the SEC powerless to effectively freeze assets to protect the interests of defrauded investors, but would also, in essence, require the defrauded investors to foot the bill of their opposing counsel. Such an outcome is extremely offensive to this Court, and unquestionably contrary to public policy and the intent and goals of the federal securities laws.[4] Because the Court finds that the retainer agreement at issue in this case contravenes public policy and the law, it concludes that such agreement is void and unenforceable as drafted. *See American Casualty Co. v. FDIC*, 1993 WL 610760, at *7 (S.D. Miss. 1993). The fact that Florida generally recognizes nonrefundable retainers does not defeat this conclusion. Even under Florida law, an agreement that contravenes public policy is not enforceable as a matter of law. *See American Casualty Co. v. Coastal Caisson Drill Co.*, 542 So.2d 957, 958 (Fla. 1989). Hence, the funds at issue were subject to the TRO entered on May 5, 1994.

The Court further finds that Grossman is not without recourse. The funds in question are only forfeitable to the extent they are comprised of the defendants' ill-gotten gains. *See, e.g., SEC v. Unioil*, 951 F.2d 1304, 1306-07 (D.C. Cir. 1991) (Edwards, J., concurring) (Party seeking disgorgement is entitled to recover only the amount of the fraud.). If Grossman can show that the funds are from some other, *untainted* source, it may have a legitimate

[4] The Court can envision still other repercussions from the upholding of agreements such as the one presented here; one being the potential for defendants, in the guise of paying legal fees, to hide assets. Such a "loophole" could conceivably be used to circumvent regulations in non-SEC areas as well.

claim to those funds.[5] In addition, Grossman may have a suit in quantum meruit against the defendants. *See, e.g., Wong v. Michael Kennedy, P.C.*, 853 F. Supp. 73, 81 (E.D.N.Y. 1994) (Although retainer agreement was void as a matter of law, counsel was not precluded from recovering payment in quantum meruit.). At the very least, Grossman can file a creditor's claim with the Receiver and, like all other creditors are required to do, wait its turn in line. *Cf. United States v. Thier*, 801 F.2d 1463, 1474 (1986), *opinion modified on denial of reh'g*, 809 F.2d 249 (5th Cir. 1987) (Attorney may bring third-party claim for reasonable fee against potentially forfeitable assets under Continuing Criminal Enterprise statute.).

2. The Temporary Restraining Order.

Because the Court has determined that Grossman has no superior interest in the funds at issue and that the funds were subject to the TRO, it must now determine whether Grossman violated that TRO by transferring the funds. Pursuant to *Fed.R.Civ.P.* 65(b), temporary restraining orders granted without notice must be "indorsed with the date and hour of issuance" and "shall expire by its terms within such time after entry, not to exceed ten days, as the Court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The

[5] Grossman, however, has not argued that the funds are untainted. Instead, its sole position is that it has a vested interest in the funds as a matter of law by virtue of its retainer agreement with the defendants.



reasons for the extension shall be entered in the record." While TRO's cannot be extended indefinitely, they can be extended pending a ruling on a motion for a preliminary injunction. *S.E.C. v. Unifund Sal*, 910 F.2d 1028, 1034 (2d Cir. 1990) ("Nothing in Rule 65 of the Federal Rules of Civil Procedure prevents a district court from continuing a TRO while reserving decision on a motion for a preliminary injunction."). Moreover, a TRO can be extended beyond the 20-day period with the consent of the restrained party. *See Fernandez-Roque v. Smith*, 671 F.2d 426 (11th Cir. 1982).

*A. Consent to the extension of the TRO*

The threshold issue for the Court to address is whether Grossman, on behalf of the defendants, consented to the extension of the TRO until the Court ruled on the pending motions. In this regard, Grossman first contends that it did not consent to the extension of the TRO. The Court, however, finds otherwise. In this case, at the close of the hearing on the SEC's motion for preliminary injunction, the Court stated that the TRO would remain in effect in all aspects until the Court ruled on the pending motions to dismiss and for preliminary injunction. Grossman did not object at that time, or at any time subsequent to the hearing. Hence, by virtue of its conduct, the Court finds that Grossman consented to the extension of the TRO until the Court ruled on the pending motions. *See Fernandez-Roque v. Smith*, 671 F.2d 426 (11th Cir. 1982). In *Fernandez-Roque*, at a hearing to determine the disposition of a previously entered TRO, the district court inquired of the restrained party whether it was willing to let the TRO continue until some time in the

future. The restrained party responded that it "would like to leave it up in the air right now." The district court interpreted that response as consent to an extension of the TRO. The Eleventh Circuit agreed.[6] *Id.* at 430.

Alternatively, Grossman argues that it did not consent to an extension beyond the twenty days provided in Rule 65(b). Specifically, Grossman asserts that "[n]either the Defendant nor the law firm consented to an extension beyond the twenty day time limit of Rule 65(b). When the Court on May 17, 1994 extended the TRO until further order of the Court, it was entirely reasonable for the law firm to believe that the Court was aware of the time limitations of Rule 65(b)." The Court finds, however, that Grossman's subjective belief as to the length of the TRO extension does not negate or limit its consent. *See Geneva Assurance Syndicate, Inc. v. Medical Emergency Servs. Assocs.*, 964 F.2d 599 (7th Cir. 1992) (An extension of a TRO beyond the 20-day period was deemed valid even though consent to the extension was based on the mistaken assumption that such extension was appealable.).[7] Moreover, Rule 65(b) clearly contemplates extension of a

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[6] Grossman also makes the argument that its filing of a motion to dismiss supports a finding that it did not consent to the extension of the TRO. The Court disagrees. *Cf. Ultracashmere House, Ltd. v. Madison's of Columbus, Inc.*, 534 F.Supp. 542 (S.D.N.Y. 1982) (On a motion to dissolve a stay of a TRO, the moving party evinced implied consent to extend the stay until the merits of dissolution were determined.).

[7] To the extent Grossman asserts that the Court failed to show "good cause" on the record for the extension, such an assertion is without merit. The Court, in essence, stated it was extending the TRO in order to have time to fully consider the various arguments and motions of the parties.



TRO beyond twenty days, and Grossman never sought to clarify the issue in this regard. Accordingly, the Court finds that the TRO was still in effect at the time of Grossman's transfer of the funds at issue.[8]

### *B. Contempt of court*

The sole remaining issue for the Court to address is whether it should find Grossman in contempt for violating the TRO. In this regard, the Court notes that Grossman's failure to comply with the TRO need not have been with the intent to disobey. *See Piambino v. Bestline Prods., Inc.*, 645 F. Supp. 1210, 1213 (S.D. Fla. 1986) (Contempt proceedings were brought against attorneys for failure to obey a court order to repay into the court registry amounts previously withdrawn in payment of legal fees following settlement of a class action where settlement had been overturned on appeal.). Indeed, the United States Supreme Court has stated that:

> The absence of willfulness does not relieve from civil contempt. Civil as distinguished from criminal contempt is a sanction to enforce compliance with an order of the court or to compensate for losses or damages sustained by reason of noncompliance. Since the purpose is remedial, it matters not with what intent the defendant did the prohibited act. . . . An act does not cease to be a violation of a law and of a decree merely because it may have been done innocently.

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[8] Because the Court finds consent, it need not address Grossman's arguments as to the calculation of the TRO period.

*McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949) (citations omitted). Hence, even if Grossman believed, in good faith, that it held legal title to the funds at issue, and that its transfer of the funds was not in violation of the Court's orders, such belief does not protect it from a finding of contempt.

In *Lamb v. Cramer*, 285 U.S. 217 (1932), a civil contempt proceeding against an attorney was brought ancillary to an action to set aside fraudulent conveyances of land and other dispositions of money and personal property by the defendant. The contempt petition alleged that the defendant in the principal suit had transferred to the attorney a substantial part of the property at issue, allegedly in payment of attorney's fees. The Supreme Court held that the attorney was subject to contempt proceedings for his actions in this regard. Specifically, the Court stated:

> The [attorney], as counsel in the principal suit, had notice of the equities alleged in the bill. So far as he acquired, pendente lite, any interest in the property involved in the suit, he was not only subject to those equities, but bound by any decree which the court might make with respect to it, to the extent that it might adjudicate the rights of the plaintiffs against the defendants . . . . His receipt and diversion of the property, which was then in gremio legis, tended to defeat any decree which the court might ultimately make in the cause. That and his retention of the property after the decree was entered were in fraud of the rights of the plaintiffs to prosecute the suit to its conclusion, and an obstruction of justice constituting a contempt of court which might be proceeded against civilly.



*Lamb*, 285 U.S. at 219. Here, Grossman acquired its interest in the disputed funds by virtue of the SEC's initiation of this law suit; i.e. pendente lite.

Grossman urges the Court to consider the case of *Republic of the Philippines v. Marcos*, 1987 U.S. Dist. LEXIS 11437 (S.D.N.Y. 1987), in which the defendant, before the court could enter a preliminary injunction and upon the advice of counsel that the TRO in that case had expired, transferred funds to his attorney in payment of services rendered. The district court found that the defendant's actions could be deemed "sly," and that such actions were clearly made in bad faith. Nevertheless, the court did not hold the defendant in contempt because the court found that there was "sufficient doubt as a matter of law" as to whether the TRO was in effect at the time of the defendant's actions. *Id.* at *14-15. The Court finds the *Marcos* case neither persuasive nor instructive. Unlike that case, the TRO at issue here clearly did not expire until the Court ruled on the pending motions to dismiss and for preliminary injunction. Moreover, the *Marcos* case involved a defendant relying on the advice of counsel that the TRO had expired. Here, Grossman acted on its own belief that the TRO had expired, and that it held legal title to the funds at issue. Being composed of officers of the court trained in the laws of this country, Grossman should be held to a higher standard of conduct in matters of this nature. Moreover, the law is clear that the alleged contemnor may not rely on its own inadvertence or misunderstanding to avoid a finding of contempt. *SEC v. Musella*, 818 F. Supp. 600, 606 (S.D.N.Y. 1993). Grossman took a calculated risk in transferring the funds; it must now bear the responsibility of its actions.

To that end, the Court concludes that Grossman is in contempt for violating the TRO entered May 5, 1994, as subsequently extended.

CONCLUSION

Based upon the foregoing considerations, it is

ORDERED AND ADJUDGED that:

1. The SEC's motion for contempt and sanctions is GRANTED. The Law Offices of J.B. Grossman is hereby found in civil contempt of Court, and is directed to remit to the Court-appointed Receiver, within ten (10) days from receipt of this order, the sum of $91,500.00, plus interest calculated pursuant to 28 U.S.C. § 1961 from June 15, 1994, the date of demand by the Receiver, to the date of this order. Payment of this amount shall purge the aforementioned contempt. Should the Law Offices of J.B. Grossman fail to make the required remittance within the time allotted, the Court shall hold a hearing to determine the appropriateness of any additional sanction as a remedy to enforce the orders of this Court.

2. Grossman's motion for reconsideration is DENIED.

DONE AND ORDERED in Chambers in Miami, Dade County, Florida, this 13th day of March, 1995.

/s/ Shelby Highsmith
UNITED STATES
DISTRICT JUDGE
SHELBY HIGHSMITH

cc: Howard Tescher, Esq.
John C. Mattimore, Esq.
Steven E. Siff, Esq.

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(Cite as: 415 U.S. 423, 94 S.Ct. 1113)

**IN THE SUPREME COURT OF THE UNITED STATES**

**GRANNY GOOSE FOODS, INC., et al., Petitioners,**

**v.**

**BROTHERHOOD OF TEAMSTERS & AUTO TRUCK DRIVERS LOCAL NO. 70 OF ALAMEDA COUNTY, etc.**

**No. 72 - 1566.**

Argued Jan. 8, 1974.

Decided March 4, 1974.

Petitioner employers brought suit in California state court alleging that respondent Union was engaging in a strike in breach of collective-bargaining agreements. The court issued a temporary restraining order on May 18, 1970. Two days later the case was removed to federal court, and on June 4 the District Court denied the Union's motion to dissolve the restraining order. Strike activity then stopped and the labor dispute remained dormant until the Union, after the petitioners had refused to bargain, resumed its strike on November 30, 1970. Two days later the District Court, on petitioners' motion, held the Union in criminal contempt for violating the restraining order. The Court of Appeals reversed on the ground that the order had expired long before November 30, 1970, reasoning that under both state law and Fed.Rule Civ.Proc. 65(b) the order expired no later than June 7, 1970, 20 days after its issuance, and rejecting petitioners' contention that the life of the order was indefinitely prolonged by 28 U.S.C. § 1450 'until dissolved or modified by the district court.' Held:

1. Whether state law or Rule 65(b) is controlling, the restraining order expired long before the date of the alleged contempt, since under the State Code of Civil Procedure a temporary restraining order is returnable no later than 15 days from its date, 20 days if good cause is shown, and must be dissolved unless the party obtaining it proceeds to submit its case for a preliminary injunction, and similarly, under Rule 65(b), such an order must expire by its own terms within 10 days after entry, 20 days if good cause is shown. Pp. 1120-1122.

2. Section 1450 was not intended to give state court injunctions greater effect after removal to federal court than they would have had if the case had remained in state court, and it should be construed in a manner consistent with the time limitations of Rule 65(b). Pp. 1122-1124.

(a) Once a case has been removed to federal court, federal law, including the Federal Rules of Civil Procedure, controls the future course of proceedings, notwithstanding state court orders issued prior to removal. The underlying purpose of § 1450 (to ensure that no lapse in a state court temporary restraining order will occur simply by removing the case to federal court) and the policies reflected in the time limitations of Rule 65(b) (stringent restrictions on the availability of ex parte restraining orders) can be accommodated by applying the rule that such a state court pre-removal order remains in force after removal no longer than it would have remained in effect under state law, but in no event longer than the Rule 65(b) time limitations, measured from the date of removal. Pp. 1122-1124.



(b) Accordingly, the order expired by its terms on May 30, 1970, under the 10-day limitation of Rule 65(b) applied from the date of removal; hence no order was in effect on November 30, 1970, and the Union violated no order when it resumed its strike at that time. P. 1124.

3. The District Court's denial of the Union's motion to dissolve the restraining order did not effectively convert the order into a preliminary injunction of unlimited duration. Pp. 1124-1127.

(a) That the Union may have had the opportunity to be heard on the merits of the preliminary injunction when it moved to dissolve the restraining order is not the controlling factor, since under Rule 65(b) the burden was on petitioners to show that they were entitled to a preliminary injunction, not on the Union to show that they were not. Pp. 1125-1126.

(b) Where a court intends to supplant a temporary restraining order, which under Rule 65(b) expires by its own terms within 10 days of issuance, with a preliminary injunction of unlimited duration pending a final decision on the merits or further order of the court, it should issue an order clearly saying so, and where it has not done so, a party against whom a temporary restraining order has issued may reasonably assume that the order has expired within Rule 65(b)'s time limits. Here, since the only orders entered were a temporary restraining order and an order denying a motion to dissolve the temporary order, the Union had no reason to believe that a preliminary injunction of unlimited duration had been issued. Pp. 1126-1127.

472 F.2d 764, affirmed.

George J. Tichy, II, for petitioners.

Duane B. Beeson, for respondent.

Mr. Justice MARSHALL delivered the opinion of the Court.

This case concerns the interpretation of 28 U.S.C. § 1450,[1] which provides in pertinent part: 'Whenever any action is removed from a State court to a district court of the United States . . . (a)ll injunctions, orders, and other proceedings had in such action prior to its removal shall remain in full force and effect until dissolved or modified by the district court.' The District Court held respondent Union in criminal contempt for violating a temporary restraining order issued by the California Superior Court on May 18, 1970, prior to the removal of the case from the Superior Court to the District Court. The Court of Appeals reversed, one judge dissenting, on the ground that the temporary restraining order had expired long before November 30, 1970, the date of the alleged contempt. 472 F.2d 764 (CA9 1973). The court reasoned that under both § 527 of the California Code of Civil

[1] Title 28 U.S.C. § 1450: "Whenever any action is removed from a State court to a district court of the United States, any attachment or sequestration of the goods or estate of the defendant in such action in the State court shall hold the goods or estate to answer the final judgment or decree in the same manner as they would have been held to answer final judgment or decree had it been rendered by the State court.

"All bonds, undertakings, or security given by either party in such action prior to its removal shall remain valid and effectual notwithstanding such removal.

"All injunctions, orders, and other proceedings had in such action prior to its removal shall remain in full force and effect until dissolved or modified by the district court."



Procedure and of Fed.Rule Civ.Proc. 65(b), the temporary restraining order must have expired no later than June 7, 1970, 20 days after its issuance. The court rejected petitioners' contention that the life of the order was indefinitely prolonged by § 1450 'until dissolved or modified by the district court,' holding that the purpose of that statute 'is to prevent a break in the force of an injunction or a restraining order that could otherwise occur when jurisdiction is being shifted,' 472 F.2d at 767, not to 'create a special breed of temporary restraining orders that survive beyond the life span imposed by the state law from which they spring and beyond the life that the district court could have granted them had the orders initiated from the federal court.' Id., at 766.

As this understanding of the statute was in conflict with decisions of two other Circuits interpreting § 1450 to preclude the automatic termination of state court temporary restraining orders,[2] we granted certiorari, 414 U.S. 816, 94 S.Ct. 130, 38 L.Ed.2d 49 (1973). Finding ourselves in substantial agreement with the analysis of the Ninth Circuit in the present case, we affirm.

I

On May 15, 1970, petitioners Granny Goose Foods, Inc., and Sunshine Biscuits, Inc., filed a complaint in the

[2] See Appalachian Volunteers, Inc. v. Clark, 432 F.2d 530 (C,6 1970), cert. denied, 401 U.S. 939, 91 S.Ct. 936, 28 L.Ed.2d 219 (1971); Morning Telegraph v. Powers, 450 F.2d 97 (CA2 1971), cert. denied, 405 U.S. 954, 92 S.Ct. 1170, 31 L.Ed.2d 231 (1972). See also The Herald Co. v. Hopkins, 325 F.Supp. 1232 (NDNY 1971); Peabody Coal Co. v. Barnes, 308 F.Supp. 902 (ED Mo. 1969).

Superior Court of California for the county of Alameda alleging that respondent, a local Teamsters Union, and its officers and agents, were engaging in strike activity in breach of national and local collective-bargaining agreements recently negotiated by multiunion-multiemployer bargaining teams. Although the exact nature of the underlying labor dispute is unclear, its basic contours are as follows: The Union was unwilling to comply with certain changes introduced in the new contracts; it believed it was not legally bound by the new agreements because it had not been a part of the multiunion bargaining units that negotiated the contracts;[3] and it

[3] This dispute was also the subject of a proceeding before the National Labor Relations Board. See Airco Industrial Gases, 195 N.L.R.B. 676 (1972). From the findings of fact in that proceeding, it appears that since 1964 it has been the practice in the trucking industry for representatives of a group of the various Teamsters locals and a group of various trucking employers to negotiate national agreements and supplemental agreements covering local areas. Agreements covering the 1967-1970 period had expired on March 31, 1970. Negotiations between the negotiating committees of the multiunion and multiemployer groups toward a contract for the 1970-1973 period began in January 1970 and continued in February and April. On April 29, the Teamsters negotiating committee approved the national and various supplemental agreements and on April 30, two representatives from each of the Teamsters locals in the multiunion group approved the agreements. Some time thereafter, a nationwide referendum vote of all Teamsters members was conducted and it was determined that the employees had ratified the agreements. The Union claimed it was not bound by the new agreements because it had made a timely withdrawal from the multiunion-multiemployer bargaining unit in a letter of January 28, 1970, to various employers, informing them of the Union's intention to negotiate a separate agreement from the national and supplemental



wanted to negotiate separate contracts with petitioner employers.

The same day the complaint was filed, the Superior Court issued a temporary restraining order enjoining all existing strike activity and ordering the defendants to show cause on May 26, 1970, why a preliminary injunction should not issue during the pendency of the suit. An amended complaint adding petitioner Standard Brands, Inc., was filed on May 18, and a modified temporary restraining order was issued that same day adding a prohibition against strike activities directed toward that employer.

On May 19, 1970, after having been served with the May 15 restraining order but before the scheduled hearing on the order to show cause, the Union and the individual defendants removed the proceeding to the District Court on the ground that the action arose under § 301 of the Labor Management Relations Act, 1974, 61 Stat. 156, 29 U.S.C. § 185.[4] On May 20, 1970 an amended removal petition was filed to take into account the modified temporary restraining order of May 18.

Simultaneously with the filing of the removal petition, the defendants filed a motion in the District Court to

agreement. The Board ultimately determined that the Union's withdrawal was not timely because negotiations had begun on January 7, 1970, prior to the attempted withdrawal. We, of course, express no view on this issue.

[4] In Avco Corp. v. Aero Lodge No. 735, 390 U.S. 557, 88 S.Ct. 1235, 20 L.Ed.2d 126 (1968), we held that § 301(a) suits initially brought in state courts may be removed to the designated federal forum under the federal-question removal jurisdiction delineated in 28 U.S.C. § 1441.

dissolve the temporary restraining order. The sole ground alleged in support of the motion was that the District Court lacked jurisdiction to maintain the restraining order under this Court's decision in Sinclair Refining Co. v. Atkinson, 370 U.S. 195, 82 S.Ct. 1328, 8 L.Ed.2d 440 (1962), where the Court held that notwithstanding § 301's grant of jurisdiction to federal courts over suits between employers and unions for breach of collective-bargaining agreements, § 4 of the Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. § 104, barred federal courts from issuing an injunction against a strike allegedly in violation of a collective-bargaining agreement containing a no-strike clause.

The employers then filed a motion to remand the case to the Superior Court, alleging that the defendants had waived their right to removal by submitting to the jurisdiction of the state court. The Union's motion to dissolve and the employers' motion to remand came on for a hearing on May 27, 1970. The motion to remand was denied from the bench. With respect to the motion to dissolve, the employers brought to the attention of the District Court our grant of certiorari in Boys Markets, Inc. v. Retail Clerks Union, 396 U.S. 1000, 90 S.Ct. 572, 24 L.Ed.2d 492 (1970), which was interpreted as an indication that the Court would re-examine its holding in Sinclair. As Boys Markets had been argued here in April 1970, the District Court refrained from taking any action on the motion to dissolve until it received further guidance from this Court. On June 1, 1970, we handed down our decision in Boys Markets, Inc. v. Retail Clerks Union, 398 U.S. 235, 90 S.Ct. 1583, 26 L.Ed.2d 199, overruling Sinclair and holding that a district court could enjoin a



strike in breach of a nostrike clause in a collective-bargaining agreement and order arbitration under the agreement. Three days later, on June 4, 1970, the District Court entered a brief order denying the motion to dissolve the state court temporary restraining order, citing Boys Markets.

Evidently picketing and strike activity stopped and the labor dispute remained dormant after June 4. The flame was rekindled, however, when on November 9, 1970, the Union sent the employers telegrams requesting bargaining to arrive at a collective-bargaining agreement and expressing the Union's continued belief that it was not bound by the national and local agreements negotiated by the multiunion-multiemployer groups. The employers answered that there was no need to bargain because, in their view, the Union was bound by the national and local agreements. The conflict remained unresolved, and on November 30, 1970, the Union commenced its strike activity once again.

The next day the employers moved the District Court to hold the Union, its agents, and officers in contempt of the modified temporary restraining order issued by the Superior Court on May 18. A hearing was held on the motion the following day. The Union's argument that the temporary restraining order had long since expired was rejected by the District Court on two grounds. First, the court concluded that its earlier action denying the motion to dissolve the temporary restraining order gave the order continuing force and effect. Second, the court found that § 1450 itself served to continue the restraining order in effect until affirmatively dissolved or modified by the court. Concluding after the hearing that the Union had willfully violated the restraining order, the District Court

held it in criminal contempt and imposed a fine of $200,000.[5]

II

Leaving aside for the moment the question whether the order denying the motion to dissolve the temporary restraining order was effectively the grant of a preliminary injunction, it is clear that whether California law or Rule 65(b) is controlling, the temporary restraining order issued by the Superior Court expired long before the date

[5] Three-fourths of the fine was conditioned on the Union's failure to end the strike within 24 hours of the court's order, one-half on failure to end the strike within 48 hours, and one-fourth on failure to end the strike within 72 hours. Although we do not rest our decision on this point, there seems to be much evidence in the record suggesting that even if the restraining order remained in effect and had been violated, the violation was not willful. A finding that the violation was willful obviously presupposes knowledge on the part of the Union that the order was still in effect. Whether or not the order in fact remained in effect on November 30, the Union evidently believed it had expired. Prior to commencing its strike in November, the Union informed the employers through its attorney that it did 'not understand from the file that there is presently in effect any order which forbids Local 70 from bargaining with the employer, or from pressing its position that it has a right to bargain for a separate contract. A motion to dissolve a temporary restraining order against economic action was denied by the federal court, but that temporary restraining order has long since become ineffective by virtue of the statutory limitation on its duration, and there has been no application for a preliminary injunction. 'Accordingly, the federal court case is pending, but there are no outstanding orders which affect the assertion by Local 70 of rights which it claims. . . .' App. 67.



of the alleged contempt. Section 527 of the California Code of Civil Procedure,[6] under which the order was

[6] Section 527 (Supp.1974) provides: 'An injunction may be granted at any time before judgment upon a verified complaint, or upon affidavits if the complaint in the one case, or the affidavits in the other, show satisfactorily that sufficient grounds exist therefor. A copy of the complaint or of the affidavits, upon which the injunction was granted, must, if not previously served, be served therewith. 'No preliminary injunction shall be granted without notice to the opposite party; nor shall any temporary restraining order be granted without notice to the opposite party, unless it shall appear from facts shown by affidavit or by the verified complaint that great or irreparable injury would result to the applicant before the matter can be heard on notice. In case a temporary restraining order shall be granted without notice, in the contingency above specified, the matter shall be made returnable on an order requiring cause to be shown why the injunction should not be granted, on the earliest day that the business of the court will admit of, but not later than 15 days or, if good cause appears to the court, 20 days from the date of such order. When the matter first comes up for hearing the party who obtained the temporary restraining order must be ready to proceed and must have served upon the opposite party at least two days prior to such hearing, a copy of the complaint and of all affidavits to be used in such application and a copy of his points and authorities in support of such application; if he be not ready, or if he shall fail to serve a copy of his complaint, affidavits and points and authorities, as herein required, the court shall dissolve the temporary restraining order. The defendant, however, shall be entitled, as of course, to one continuance for a reasonable period, if he desire it, to enable him to meet the application for the preliminary injunction. The defendant may, in response to such order to show cause, present affidavits relating to the granting of the preliminary injunction, and if such affidavits are served on the applicant at least two days prior to the hearing, the applicant shall not be entitled to any continuance on account thereof. On the day upon which such order is made returnable,

issued, provides that temporary restraining orders must be returnable no later than 15 days from the date of the order, 20 days if good cause is shown, and unless the party obtaining the order then proceeds to submit its case for a preliminary injunction, the temporary restraining order must be dissolved.[7] Similarly, under Rule

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such hearing shall take precedence of all other matters on the calendar of said day, except older matters of the same character, and matters to which special precedence may be given by law. When the cause is at issue it shall be set for trial at the earliest possible date and shall take precedence of all other cases, except older matters of the same character, and matters to which special precedence may be given by law.'

[7] The time limitation of § 527 has been strictly construed by the California courts. See, e.g., Smith v. Superior Court, 64 Cal.App. 722, 222 P. 857 (1923); Sharpe v. Brotzman, 145 Cal.App.2d 354, 302 P.2d 668 (1956); Oksner v. Superior Court, 229 Cal.App.2d 672, 40 Cal.Rptr. 621 (1964); Agricultural Prorate Comm'n v. Superior Court, 30 Cal.App.2d 154, 85 P.2d 898 (1938). Petitioners argue that the time limitation of § 527 is not applicable here because it is operative only with respect to orders granted without notice to the adverse party. In the present case, petitioners indicate, telephonic notice was given to the Union's counsel on May 15, the day the employers first sought the restraining order, counsel was served with all documents prior to a hearing arranged that day, and counsel was present in the courtroom and presented argument on behalf of the Union at that hearing. We think it clear from § 527, however, that this kind of informal notice and hearing does not convert the temporary restraining order into a preliminary injunction of unlimited duration under state law. Section 527 provides that when a case comes up for a hearing on a preliminary injunction, the party seeking the injunction 'must have served upon the opposite party at least two days prior to such hearing, a copy of the complaint and of all affidavits to be used in such application and a copy of his points and authorities in support of such application. . . . ' (Emphasis added.) In



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providing that no preliminary injunction shall be granted without notice to the opposite party, we think the statute thus contemplates notice of at least two days, with a meaningful opportunity to prepare for the hearing, rather than the kind of informal, same-day notice that was given in this case. This interpretation of state law is supported on the facts of this case. Even though the Superior Court held some sort of hearing, with Union counsel attending, before granting the temporary restraining order, the court obviously felt that the hearing was not a sufficient basis for ruling on the preliminary injunction. Accordingly, in the same order granting the temporary restraining order, the court set the case for a hearing on the application for a preliminary injunction within the 15-day limit imposed by § 527. In any event, we need not rest our holding on this interpretation of state law, for even if this restraining order could have had unlimited duration under California law, it was subject to the time limitations of Rule 65(b) after the case was removed to federal court. See infra, at 1123-1124. Although by its terms Rule 65(b), like § 527, only limits the duration of restraining orders issued without notice, we think it applicable to the order in this case even though informal notice was given. The 1966 Amendments to Rule 65(b), requiring the party seeking a temporary restraining order to certify to the court in writing the efforts, if any, which have been made to give either written or oral notice to the adverse party or his attorney, were adopted in recognition of the fact that informal notice and a hastily arranged hearing are to be preferred to no notice or hearing at all. See Advisory Committee's Note, 28 U.S.C.App. 7831, 39 F.R.D. 124-125. But this informal, same-day notice, desirable though it may be before a restraining order is issued, is no substitute for the more thorough notice requirements which must be satisfied to obtain a preliminary injunction of potentially unlimited duration. The notice required by Rule 65(a) before a preliminary injunction can issue implies a hearing in which the defendant is given a fair opportunity to oppose the application and to prepare for such opposition. Sims v. Greene,

65(b),[8] temporary restraining orders must expire by their

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161 F.2d 87 (CA3 1947). The same-day notice provided in this case before the temporary restraining order was issued does not suffice. See Bailey v. Transportation-Communication Employees Union, 45 F.R.D. 444 (ND Miss.1968). See also C. Wright & A. Miller, Federal Practice & Procedure: Civil § 2949, p. 468 (1973 ed.), reading into Rule 65(a) a five-day-notice requirement based on Fed.Rule Civ.Proc. 6(d).

[8] Rule 65(b) provides: '(b) Temporary Restraining Order; Notice; Hearing; Duration. 'A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice



own terms within 10 days after entry, 20 days if good cause is shown.

Petitioners argue, however, that notwithstanding the time limitations of state law, § 1450 keeps all state court injunctions, including ex parte temporary restraining orders, in full force and effect after removal until affirmatively dissolved or modified by the district court. To the extent this reading of § 1450 is inconsistent with the time limitations of Rule 65(b), petitioners contend the statute must control.

In our view, however, § 1450 can and should be interpreted in a manner which fully serves its underlying purposes, yet at the same time places it in harmony with the important congressional policies reflected in the time limitations in Rule 65(b).

At the outset, we can find no basis for petitioners' argument that § 1450 was intended to turn ex parte state court temporary restraining orders of limited duration into federal court injunctions of unlimited duration. Section 1450 was simply designed to deal with the unique problem of a shift in jurisdiction in the middle of a case which arises whenever cases are removed from state to federal court. In this respect two basic purposes are served. Judicial economy is promoted by providing that proceedings had in state court shall have force and effect in federal court, so that pleadings filed in state court, for

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to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.'

example, need not be duplicated in federal court.[9] In addition, the statute ensures that interlocutory orders entered by the state court to protect various rights of the parties will not lapse upon removal. Thus attachments, sequestrations, bonds, undertakings, securities, injunctions, and other orders obtained in state court all remain effective after the case is removed to federal court.

But while Congress clearly intended to preserve the effectiveness of state court orders after removal, there is no basis for believing that § 1450 was designed to give injunctions or other orders greater effect after removal to federal court than they would have had if the case had remained in state court. After removal, the federal court 'takes the case up where the State court left it off.' Duncan v. Gegan, 101 U.S. 810, 812, 25 L.Ed. 875 (1880). The "'full force and effect' provided state court orders after removal of the case to federal court was not intended to be more than the force and effect the orders would have had in state court.[10]

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[9] See, e.g., Madron v. Thomas, 38 F.R.D. 177 (ED Tenn.1965); Murphy v. E. I. du Pont De Nemours & Co., 26 F.Supp. 999 (WD Pa.1939); Borton v. Connecticut Gen. Life Ins. Co., 25 F.Supp. 579 (D.C.Neb.1938). Of course, repleading may be required by the district court in appropriate cases. See, e.g., Foust v. Baltimore & O.R. Co., 91 F.Supp. 817 (SD Ohio 1950); Shall Petroleum Corp. v. Stueve, 25 F.Supp. 879 (D.C.Minn.1938).

[10] We note that § 1450 expressly provides that attachments or sequestrations effected by the state court prior to removal 'shall hold the goods or estate to answer the final judgment or decree in the same manner as they would have been held to answer final judgment or decree had it been rendered by the State court.' Petitioners argue that since post-removal treatment of an attachment effected in the state court was expressly made dependent on the provisions of state law, while no such express



More importantly, once a case has been removed to federal court, it is settled that federal rather than state law governs the future course of proceedings, notwithstanding state court orders issued prior to removal. Section 1450 implies as much by recognizing the district court's authority to dissolve or modify injunctions, orders, and all other proceedings had in state court prior to removal. This Court resolved this issue long ago in Ex parte Fisk, 113 U.S. 713, 5 S.Ct. 724, 28 L.Ed. 1117 (1885). There it was argued that an order to take the deposition of a witness issued by the state court prior to removal was binding in federal court and could not be reconsidered by the federal court, notwithstanding its inconsistency with certain federal statutes governing procedure in federal courts. The Court rejected this contention, and said that the predecessor of § 1450

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provision was made with respect to injunctions issued by the state court prior to removal, Congress must have intended that injunction orders not be controlled after removal by the durational limitations of state law. As we view the matter, the express provision in § 1450 that state law governs attachments after removal is simply an additional statement of long-settled federal law providing that in all cases in federal court, whether or not removed from state court, state law is incorporated to determine the availability of prejudgment remedies for the seizure of person or property to secure satisfaction of the judgment ultimately entered. See Fed.Rule Civ.Proc. 64. Section 1450 makes it clear that this settled rule of federal law applies to removed cases as well. If anything, therefore, it supports our conclusion that the other procedural requirements of federal law, including the time limitations of Rule 65(b), must be applied to state court temporary restraining orders after the case has been removed to federal court. See infra, at 1123-1124.

"declares orders of the State court, in a case afterwards removed, to be in force until dissolved or modified by the Circuit Court. This fully recognizes the power of the latter court over such orders. And it was not intended to enact that an order made in the State court, which affected or might affect the mode of trial yet to be had, could change or modify the express directions of an act of Congress on that subject.

"The petitioner having removed his case into the Circuit Court has a right to have its further progress governed by the law of the latter court, and not by that of the court from which it was removed; and if one of the advantages of this removal was an escape from this examination, he has a right to that benefit if his case was rightfully removed."

Id., at 725-726, 5 S.Ct., at 729-730. See also King v. Worthington, 104 U.S. 44, 26 L.Ed. 652 (1881); Freeman v. Bee Machine Co., 319 U.S. 448, 63 S.Ct. 1146, 87 L.Ed. 1509 (1943).

By the same token, respondent Union had a right to the protections of the time limitation in Rule 65(b) once the case was removed to the District Court. The Federal Rules of Civil Procedure, like other provisions of federal law, govern the mode of proceedings in federal court after removal. See Fed.Rule Civ.Proc. 81(c).[11] In addition, we may note that although the durational limitations imposed on ex parte restraining orders are now codified in a federal rule, they had their origin in § 17 of the Clayton Act of 1914, 38 Stat. 737. As the House Report

[11] See generally Wright & Miller, supra, n. 7, § 1024, at 108-110, and cases there cited.



recommending its enactment emphasized, the durational and other limitations imposed on temporary restraining orders were thought necessary to cure a serious problem of 'ill-considered injunctions without notice.'[12] The stringent restrictions imposed by § 17, and now by Rule 65,[13] on the availability of ex parte temporary restraining orders reflect the fact that our entire jurisprudence runs counter to the notion of court action taken before reasonable notice and an opportunity to be heard has been granted both sides of a dispute. Ex parte temporary restraining orders are no doubt necessary in certain circumstances, cf. Carroll v. President and Commissioners of Princess Anne, 393 U.S. 175, 180, 89 S.Ct. 347, 351, 21 L.Ed.2d 325 (1968), but under federal law they should be restricted to serving their underlying purpose of preserving the status quo and preventing irreparable harm just so long as is necessary to hold a hearing, and no longer.[14]

[12] See H.R.Rep. No. 627, 63d Cong., 2d Sess., 25 (1914).

[13] Section 17 of the Clayton Act was codified as 28 U.S.C. § 381 (1940 ed.), and was repealed by the Judicial Code Revision Act of 1948, 62 Stat. 997, for the stated reason that it was covered by Rule 65. See H.R.Rep. No. 308, 80th Cong., 1st Sess., A236 (1947).

[14] See, e.g., Pan American World Airways, Inc. v. Flight Engineers' Int'l Assn., 306 F.2d 840 (CA2 1962); Smotherman v. United States, 186 F.2d 676 (CA10 1950); Sims v. Greene, 161 F.2d 87 (CA3 1947). This basic purpose is implicit in Rule 65(b)'s requirement that after a temporary restraining order is granted without notice, 'the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character. . . .'

We can find no indication that Congress intended § 1450 as an exception to its broader, longstanding policy of restricting the duration of ex parte restraining orders. The underlying purpose of § 1450 – ensuring that no lapse in a state court temporary restraining order will occur simply by removing the case to federal court – and the policies reflected in Rule 65(b) can easily be accommodated by applying the following rule: An ex parte temporary restraining order issued by a state court prior to removal remains in force after removal no longer than it would have remained in effect under state law, but in no event does the order remain in force longer than the time limitations imposed by Rule 65(b), measured from the date of removal.[15]

Applying our holding to the present case is simple. The temporary restraining order was issued by the Superior Court on May 18, 1970, and would have remained in effect in the state court no longer than 15 days, or until June 2. The case was removed to federal court on May 20, 1970. The temporary restraining order therefore expired

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[15] The following two illustrations should suffice to clarify this holding. Where the state court issues a temporary restraining order of 15 days' duration on Day 1 and the case is removed to federal court on Day 13, the order will expire on Day 15 in federal court just as it would have expired on Day 15 in state court. Where, however, a state court issues a temporary restraining order of 15 days' duration on Day 1 and the case is removed to the federal court on Day 2, the restraining order will expire on Day 12, applying the 10-day time limitation of Rule 65(b) measured from the date of removal. Of course, in either case, the district court could extend the restraining order for up to an additional 10 days, for good cause shown, under Rule 65(b).



on May 30, 1970, applying the 10-day limitation of Rule 65(b) from the date of removal. Accordingly, no order was in effect on November 30, 1970, and the Union violated no order when it resumed its strike at that time.

III

We now turn to petitioners' argument that, apart from the operation of § 1450, the District Court's denial of the Union's motion to dissolve the temporary restraining order effectively converted the order into a preliminary injunction of unlimited duration. The Court of Appeals rejected this argument out of hand, stating that '(t)he Union's unsuccessful effort to dissolve the order before it died a natural death did not convert the temporary restraining order into a preliminary injunction or estop it from relying on the death certificate.' 472 F.2d, at 767. We reach essentially the same conclusion.

As indicated earlier, once a case has been removed to federal court, its course is to be governed by federal law, including the Federal Rules of Civil Procedure. Rule 65(b) establishes a procedure whereby the party against whom a temporary restraining order has issued can move to dissolve or modify the injunction, upon short notice to the party who obtained the order. Situations may arise where the parties, at the time of the hearing on the motion to dissolve the restraining order, find themselves in a position to present their evidence and legal arguments for or against a preliminary injunction. In such circumstances, of course, the court can proceed with the hearing as if it were a hearing on an application for a preliminary injunction. At such hearing, as in any other

hearing in which a preliminary injunction is sought, the party seeking the injunction would bear the burden of demonstrating the various factors justifying preliminary injunctive relief, such as the likelihood of irreparable injury to it if an injunction is denied and its likelihood of success on the merits.[16]

On the other hand, situations might arise where the parties are not prepared and do not intend at the hearing on the motion to dissolve or modify the temporary restraining order to present their cases for or against a preliminary injunction. In such circumstances, the appropriate procedure would be for the district court to deal with the issues raised in the motion to dissolve or modify the restraining order, but to postpone for a later hearing, still within the time limitations of Rule 65(b), the application for a preliminary injunction. See generally, C. Wright & A. Miller, Federal Practice & Procedure: Civil 2954, p. 523 (1973 ed.).

In the present case we think it plain that the hearing on the Union's motion to dissolve the restraining order cannot be considered to be a hearing on a preliminary injunction, and that the District Court's order denying the motion to dissolve cannot reasonably be construed as the grant of a preliminary injunction. There is no indication in the record that either party or the District Court itself treated the May 27 hearing as a hearing on an application for a preliminary injunction. The employers made no

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[16] See, e.g., Robert W. Stark, Jr., Inc. v. New York Stock Exchange, Inc., 466 F.2d 743 (CA2 1972); Crowther v. Seaborg, 415 F.2d 437 (CA10 1969); Garlock, Inc. v. United Seal, Inc., 404 F.2d 256 (CA6 1968).



attempt at that time to present their case for a preliminary injunction. Likewise, the Union made no attempt at that time to present its defense that it was not bound by the new national and local agreements because it had made a timely withdrawal from the multiunion bargaining unit negotiating said contracts. See n. 3, supra. The court itself did not indicate that it was undertaking a hearing on a preliminary injunction. As far as we can tell, it never addressed itself at the hearing to the various equitable factors involved in considering a preliminary injunction, but only considered the employers' argument that the case should be remanded to the state court because the right to remove had been waived by the Union's appearing in the state proceeding and the Union's argument that the temporary restraining order should be dissolved for want of jurisdiction under the Sinclair holding.

We cannot accept petitioners' argument that the controlling factor is that the Union had the opportunity to be heard on the merits of the preliminary injunction when it moved in the District Court to dissolve the temporary restraining order. Rule 65(b) does not place upon the party against whom a temporary restraining order has issued the burden of coming forward and presenting its case against a preliminary injunction. To the contrary, the Rule provides that '(i)n case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time . . . and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court

shall dissolve the temporary restraining order.' The burden was on the employers to show that they were entitled to a preliminary injunction, not on the Union to show that they were not.

Even were we to assume that the District Court had intended by its June 4 order to grant a preliminary injunction, its intention was not manifested in an appropriate form. Where a hearing on a preliminary injunction has been held after issuance of a temporary restraining order, and where the District Court decides to grant the preliminary injunction, the appropriate procedure is not simply to continue in effect the temporary restraining order, but rather to issue a preliminary injunction, accompanied by the necessary findings of fact and conclusions of law.[17] As stated by the Second Circuit:

'The fact that notice is given and a hearing held cannot serve to extend indefinitely beyond the period limited by (Rule 65(b)) the time during which a temporary restraining order remains effective. The (Rule) contemplates that notice and hearing shall result in an appropriate adjudication, i.e., the issuance or denial of a preliminary injunction, not in extension of the temporary

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[17] Fed.Rule Civ.Proc. 52(a) provides that 'in granting or refusing interlocutory injunctions the court shall . . . set forth the findings of fact and conclusions of law which constitute the grounds of its action.' Where a temporary restraining order has been continued beyond the time limits permitted under Rule 65(b), and where the required findings of fact and conclusions of law have not been set forth, the order is invalid. See, e.g., National Mediation Bd. v. Air Line Pilots Assn., 116 U.S.App.D.C. 300, 323 F.2d 305 (1963); Sims v. Greene, 160 F.2d 512 (CA3 1947).



stay.' Pan American World Airways, Inc. v. Flight Engineers' Int'l Assn., 306 F.2d 840, 842 1962) (footnotes omitted). See also Sims v. Greene, 160 F.2d 512 (CA3 1947).

As the fine imposed in this case exemplifies, serious penalties can befall those who are found to be in contempt of court injunctions. Accordingly, one basic principle built into Rule 65 is that those against whom an injunction is issued should receive fair and precisely drawn notice of what the injunction actually prohibits.[18]

'The judicial contempt power is a potent weapon. When it is founded upon a decree too vague to be understood, it can be a deadly one. Congress responded to that danger by requiring that a federal court frame its orders so that those who must obey them will know what the court intends to require and what it means to forbid. . . . The most fundamental postulates of our legal order forbid the imposition of a penalty for disobeying a command that defies comprehension.' International Longshoremen's Assn. v. Philadelphia Marine Trade Assn., 389 U.S. 64, 76, 88 S.Ct. 201, 208, 19 L.Ed.2d 236 (1967).

It would be inconsistent with this basic principle to countenance procedures whereby parties against whom an injunction is directed are left to guess about its intended duration. Rule 65(b) provides that temporary restraining orders expire by their own terms within 10

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[18] Rule 65(d) provides: 'Every order granting an injunction and every restraining order . . . shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained. . . .'

days of their issuance. Where a court intends to supplant such an order with a preliminary injunction of unlimited duration pending a final decision on the merits or further order of the court, it should issue an order clearly saying so. And where it has not done so, a party against whom a temporary restraining order has issued may reasonably assume that the order has expired within the time limits imposed by Rule 65(b). Here, since the only orders entered were a temporary restraining order of limited duration and an order denying a motion to dissolve the temporary order, the Union had no reason to believe that a preliminary injunction of unlimited duration had been issued.

Since neither § 1450 nor the District Court's denial of the Union's motion to dissolve the temporary restraining order effectively converted that order into a preliminary injunction, no order was in effect on November 30, 1970, over six months after the temporary restraining order was issued.[19] There being no order to violate, the District Court erred in holding the Union in contempt, and the judgment of the Court of Appeals reversing the District Court's adjudication of contempt must be affirmed.

Judgment affirmed.

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[19] In view of our disposition of the case, we need not and do not reach respondent's argument that notwithstanding Boys Markets v. Retail Clerks Union, 398 U.S. 235, 90 S.Ct. 1583, 26 L.Ed.2d 199 (1970), the temporary restraining order issued in this case should be governed by the 5-day limit of § 7 of the Norris-La Guardia Act, 29 U.S.C. § 107.



Mr. Justice REHNQUIST, with whom THE CHIEF JUSTICE, Mr. Justice STEWART, and Mr. Justice POWELL join, concurring in the judgment.

I agree with the Court that the judgment of the Court of Appeals for the Ninth Circuit in this case should be affirmed, since there was no injunctive order in effect at the time that respondent's allegedly contemptuous conduct occurred. But I do not join that portion of the Court's opinion which lays down a 'rule' for all cases involving 28 U.S.C. § 1450,[1] the statute which all parties agree is controlling in the case before us. In my view, the announcement of this 'rule' is neither necessary to the decision of this case nor consistent with the provisions of the statute itself.

The Court persuasively demonstrates in its opinion that the temporary restraining order issued by the California Superior Court had expired by its own terms long before the alleged contempt occurred. And I see nothing in the language or legislative history of 28 U.S.C. § 1450, providing that '(a)ll injunctions, orders, and other proceedings had in such action prior to its removal shall remain in full force and effect until dissolved or modified by the district court,' which would indefinitely extend the Superior Court's restraining order beyond the time of its normal expiration under state law. Since the temporary restraining order, had the case remained in state court,

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[1] The relevant provision of 28 U.S.C. § 1450 reads: "All injunctions, orders, and other proceedings had in such action prior to its removal shall remain in full force and effect until dissolved or modified by the district court."

concededly would have expired in early June, respondent's actions in November and December could not have constituted a contempt of that order.

The Court also persuasively demonstrates that none of the proceedings occurring after removal of the case to the United States District Court had the effect of converting the subsisting state court temporary restraining order into a preliminary injunction of indefinite duration. Those proceedings addressed markedly different issues and certainly did not give the state court order a new, independent federal existence.

Having said this much, the Court has disposed of the case before it. The opinion then goes on, however, to devise a 'rule' that '(a)n ex parte temporary restraining order issued by a state court prior to removal remains in force after removal no longer than it would have remained in effect under state law, but in no event does the order remain in force longer than the time limitations imposed by Rule 65(b), measured from the date of removal.' Ante, at 1124. (Footnote omitted.) But the determination that mere removal of a case to a federal district court does not extend the duration of a previously issued state court order past its original termination date makes quite unnecessary to this case any further discussion about time limitations contained in Fed.Rules Civ.Proc. 65(b). More importantly, the second clause of the 'rule' devised by the Court seems quite contrary to the specific language of 28 U.S.C. § 1450.

The Court apparently bases this latter clause of the 'rule' upon the observation that 'respondent Union had a right to the protections of the time limitation in Rule



65(b) once the case was removed to the District Court.' While this premise probably has a good deal to recommend it as a matter of practicality or of common sense, the language of the statute gives no hint that rules of practice governing issuance of federal injunctions in the first instance were automatically to be incorporated in applying its terms. The statute says that the state court's temporary restraining order 'shall remain in full force and effect until dissolved or modified by the district court.' This Court's 'rule,' however, says that it shall not remain in full force and effect, even though not dissolved or modified by the District Court, if it would have a life beyond the time limitations imposed by Rule 65(b).

I think it likely that the interest in limiting the duration of temporary restraining orders which is exemplified in Rule 65(b) can be fully protected in cases removed to the district court by an application to modify or dissolve a state court restraining order which is incompatible with those terms.[2] Such a procedure would be quite consistent with § 1450, which specifically contemplates dissolution or modification by the district court upon an appropriate showing, in a way that the 'rule' devised by the Court in this case is not. It is unlikely that many orders issued under rules of state procedure, primarily designed, after all, to provide suitable procedures for state courts rather than to frustrate federal procedural rules in removed

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[2] Indeed, respondent's motion to dissolve the state court order because of the prohibitions contained in the Norris-LaGuardia Act, 29 U.S.C. § 104, was just such a motion. That motion was denied by the District Court, however, and respondent made no further effort to obtain a modification or dissolution of the state restraining order prior to its expiration.

actions, would by their terms remain in effect for a period of time far longer than that contemplated by the comparable Federal Rule of Civil Procedure. But in the rare case where such a condition obtains, it is surely not asking too much of a litigant in a removed case to comply with § 1450 and affirmatively move for appropriate modification of the state order.

Therefore, although I cannot subscribe to the rule which the Court fashions to govern cases of this type, I concur in its conclusion that respondent's activity in November and December 1970 did not violate any injunctive order which was in force at that time.[3]

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[3] I see no occasion for the Court's rather casual speculation, contained in n. 5 of its opinion, that the respondent's violation of the order, even were it effective at the time of its later conduct, may not have been 'willful.' The Court has concluded that the order was not effective at that later time, and it can serve no useful purpose to speculate about the sufficiency of the evidence with respect to violation of a defunct order.

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**Arthur F. SAMPSON, Administrator, General Services Administration, et al.,**

**Petitioners,**

**v.**

**Jeanne M. MURRAY**

**No. 72 – 403.**

Argued Nov. 14, 1973.

Decided Feb. 19, 1974.

Upon being notified that she was going to be discharged on a specific date from her position as a probationary Government employee, respondent filed this action claiming that the applicable Civil Service regulations for discharge of probationary employees had not been followed, and seeking a temporary injunction against her dismissal pending an administrative appeal to the Civil Service commission (CSC). The District Court granted a temporary restraining order, and after an adversary hearing at which the Government declined to produce the discharging official as a witness to testify as to the reasons for the dismissal, ordered the temporary injunctive relief continued. The Court of Appeals affirmed, rejecting the Government's contention that the District Court had no authority to grant temporary injunctive relief in this class of cases, and holding that the relief granted was within the permissible bounds of the District Court's discretion. Held: While the District Court is not totally without authority to grant interim injunctive relief to a discharged government employee, nevertheless under the standards that must govern the issuance of such relief the District Court's issuance of the temporary injunctive relief here cannot be sustained. Pp. 942-954.

(a) The District Court's authority to review agency action, Service v. Dulles, 354 U.S. 363, 77 S.Ct. 1152, 1 L.Ed.2d 1403, does not come into play until it may be authoritatively said that the administrative decision [sic] to discharge an employee does in fact fail to conform to the applicable regulations, and until administrative action has become final, no court is in a position to say that such action did or did not conform to the regulations. Here the District Court authorized, on an interim basis, relief that the CSC had neither considered nor authorized – the mandatory reinstatement of respondent in her Government position. Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4, 62 S.Ct. 875, 86 L.Ed. 1229; FTC v. Dean Foods Co., 384 U.S. 597, 86 S.Ct. 1738, 16 L.Ed.2d 802, distinguished. Pp. 943-947.

(b) Considering the disruptive effect that the grant of temporary relief here was likely to have on the administrative process, and in view of the historical denial of all equitable relief by federal courts in disputes involving discharge of Government employees; the well-established rule that the Government be granted the widest latitude in handling its own internal affairs; and the traditional unwillingness of equity courts to enforce personal service contracts, the Court of Appeals erred in routinely applying the traditional standards governing more orthodox "stays," and respondent at the very least must show irreparable injury sufficient in kind and degree to override the foregoing factors. Pp. 947-950.

(c) Viewing the order at issue as a preliminary injunction, the Court of Appeals erred in suggesting that at this stage of the proceeding the District Court need not have concluded that there was actually irreparable injury,



and in intimating that, as alleged in respondent's unverified complaint, either loss of earnings or damage to reputation might afford a basis for a finding of irreparable injury. Pp. 950-954.

149 U.S.App.D.C. 256, 462 F.2d 871, reversed.

Keith A. Jones, Washington, D.C., for petitioners.

Thomas J. McGrew, Washington, D.C., for respondent, pro hac vice, by special leave of Court.

Mr. Justice REHNQUIST delivered the opinion of the Court.

Respondent is a probationary employee in the Public Buildings Service of the General Services Administration (GSA). In May 1971, approximately four months after her employment with GSA began, she was advised in writing by the Acting Commissioner of the Public Buildings Service, W.H. Sanders, that she would be discharged from her position on May 29, 1971. She then filed this action in the United States District Court for the District of Columbia, seeking to temporarily enjoin her dismissal pending her pursuit of an administrative appeal to the Civil Service Commission. The District Court granted a temporary restraining order, and after an adversary hearing extended the interim injunctive relief in favor of respondent until the Acting Commissioner of the Public Buildings Service testified about the reasons for respondent's dismissal.

A divided Court of Appeals for the District of Columbia Circuit affirmed,[1] rejecting the Government's contention that the District Court had no authority whatever to grant temporary injunctive relief in this class of cases, and holding that the relief granted by the District Court in this particular case was within the permissible bounds of its discretion. We granted certiorari, sub nom. Kunzig v. Murray, 410 U.S. 981, 93 S.Ct. 1494, 36 L.Ed.2d 177 (1973). We agree with the Court of Appeals that the District Court is not totally without authority to grant interim injunctive relief to a discharged Government employee, but conclude that, judged by the standards which we hold must govern the issuance of such relief, the issuance of the temporary injunctive relief by the District Court in this case cannot be sustained.

I

Respondent was hired as a program analyst by the Public Building Service after previous employment in the Defense Intelligence Agency. Under the regulations of the Civil Service Commission, this career conditional appointment was subject to a one-year probationary period.[2] Applicable regulations provided that respondent, during this initial term of probation, could be dismissed without being afforded the greater procedural

[1] Murray v. Kunzig, 149 U.S.App.D.C. 256, 462 F.2d 871 (1972). For a discussion of the Court of Appeals' jurisdiction, and the jurisdiction of this Court, see infra, at 951-952.

[2] 5 CFR § 315.801.



advantages available to permanent employees in the competitive service.[3] The underlying dispute between the parties arises over whether the more limited procedural requirements applicable to probationary employees were satisfied by petitioners in this case.

The procedural protections which the regulations accord to most dismissed probationary employees are limited. Commonly a Government agency may dismiss a probationary employee found unqualified for continued employment simply "by notifying him in writing as to why he is being separated and the effective date of the action."[4] More elaborate procedures are specified when the ground for terminating a probationary employee is "for conditions arising before appointment."[5] In such cases the regulations require that the employee receive "an advance written notice stating the reasons, specifically and in detail, for the proposed action"; that the employee be given an opportunity to respond in writing and to furnish affidavits in support of his response; that the agency "consider" any answer filed by the employee in reaching its decision; and that the employee be notified of the agency's decision at the earliest practicable date.[6]

[3] Compare 5 CFR §§ 315.801 – 315.807 with 5 CFR § 752.101 et seq.

[4] 5 CFR § 315.804.

[5] 5 CFR § 315.805.

[6] Section 315.805 reads in full: § 315.805 Termination of probationers for conditions arising before appointment. "When an agency proposes to terminate an employee serving a probationary or trial period for reasons based in whole or in part on conditions arising before his appointment, the employee is entitled to the following: "(a) Notice of proposed adverse

Respondent contends that her termination was based in part on her activities while in the course of her previous employment in the Defense Intelligence Agency, and that therefore she was entitled to an opportunity to file an answer under this latter provision.

The letter which respondent received from the Acting Commissioner, notifying her of the date of her discharge, stated that the reason for her discharge was her "complete unwillingness to follow office procedure and to accept direction from [her] supervisors." After receipt of the letter, respondent's counsel met with a GSA personnel officer to discuss her situation and, in the course of the meeting, was shown a memorandum prepared by an officer of the Public Buildings Service upon which Sanders apparently based his decision to terminate respondent's employment. The memorandum contained both a discussion of respondent's conduct in her job with

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action. The employee is entitled to an advance written notice stating the reasons, specifically and in detail, for the proposed action. "(b) Employee's answer. The employee is entitled to a reasonable time for filing a written answer to the notice of proposed adverse action and for furnishing affidavits in support of his answer. If the employee answers, the agency shall consider the answer in reaching its decision. "(c) Notice of adverse decision. The employee is entitled to be notified of the agency's decision at the earliest practicable date. The agency shall deliver the decision to the employee at or before the time the action will be made effective. The notice shall be in writing, inform the employee of the reasons for the action, inform the employee of his right of appeal to the appropriate office of the Commission, and inform him of the time limit within which the appeal must be submitted as provided in § 315.806(d)."



the Public Buildings Service and a discussion of her conduct during her previous employment at the Defense Intelligence Agency. Relying upon the inclusion of the information concerning her previous employment, respondent's counsel requested that she be given a detailed statement of the charges against her and an opportunity to reply – the procedures to which she would be entitled under the regulations if in fact the basis of her discharge had been conduct during her previous employment. This request was denied.

Respondent then filed an administrative appeal with the Civil Service Commission pursuant to the provisions of 5 CFR § 315.806(c), alleging that her termination was subject to § 315.805 and was not effected in accordance with the procedural requirements of that section.[7] While her administrative appeal was pending undecided, she filed this action. Her complaint alleged that the agency had failed to follow the appropriate Civil Service regulations, alleged that her prospective discharge would deprive her of income and cause her to suffer the embarrassment of being wrongfully discharged, and requested a temporary restraining order and interim injunctive relief against her removal from employment pending agency determination of her appeal. The District Court granted the temporary restraining order at the time of the filing of respondent's complaint, and set a hearing on the

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[7] Section 315.806(c) reads: "A probationer whose termination is subject to § 315.805 may appeal on the ground that his termination was not effected in accordance with the procedural requirements of that section."

application for a temporary injunction for the following week.

At the hearing on the temporary injunction, the District Court expressed its desire to hear the testimony of Sanders in person, and refused to resolve the controversy on the basis of his affidavit which the Government offered to furnish. When the Government declined to produce Sanders, the court ordered the temporary injunctive relief continued, stating that "Plaintiff may suffer immediate and irreparable injury, loss and damage before the Civil Service Commission can consider Plaintiff's claim."[8] The Government, desiring to test the authority of the District Court to enter such an order, has not produced Sanders, and the interim relief awarded respondent continues in effect at this time.

On the Government's appeal to the Court of Appeals for the District of Columbia Circuit, the order of the District Court was affirmed. Although recognizing that "Congress presumably could remove the jurisdiction of

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[8] The order of the District Court stated in full: "It appearing to the Court from the affidavits and accompanying exhibits that a Temporary Restraining Order, pending the appearance before this Court of Mr. W. H. Sanders, Acting Commissioner, Public Buildings Service, should issue because, unless Defendants are restrained from terminating Plaintiff's employment, Plaintiff may suffer immediate and irreparable injury, loss and damage before the Civil Service Commission can consider Plaintiff's claim, "NOW, THEREFORE, IT IS ORDERED, that the Temporary Restraining Order issued by this Court at twelve o'clock p.m., May 28, 1971, is continued until the appearance of the aforesaid W. H. Sanders. "IT IS FURTHER ORDERED that a copy of this Order be served by the United States Marshal on Defendants forthwith."



the District Courts to grant such equitable interim relief, in light of the remedies available,"[9] the court found that the District Court had the power to grant relief in the absence of an explicit prohibition from Congress. The Court of Appeals decided that the District Court acted within the bounds of permissible discretion in requiring Sanders to appear and testify,[10] and in continuing the temporary injunctive relief until he was produced as a witness by the Government.

II

While it would doubtless be intellectually neater to completely separate the question whether a District Court has authority to issue any temporary injunctive relief at the behest of a discharged Government employee from the question whether the relief granted in this case was proper, we do not believe the questions may be thus bifurcated into two watertight compartments. We believe the basis for our decision can best be illuminated by taking up the various arguments which the parties urge upon us.

Petitioners point out, and the Court of Appeals below apparently recognized, that Congress has given the District Courts no express statutory authorization to issue temporary "stays" in Civil Service cases. Although Congress has often specifically conferred such authority when it so desired – for example, in the enabling statutes

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[9] 149 U.S.App.D.C., at 262 n. 21, 462 F.2d, at 877 n. 21.

[10] Id., at 263 – 264, 462 F.2d, at 878 – 879.

establishing the NLRB,[11] the FTC,[12] the FPC,[13] and the SEC[14] – the statutes governing the Civil Service Commission are silent on the question.[15] The rules and regulations promulgated pursuant to a broad grant of statutory authority likewise make no provision for interlocutory judicial intervention.

The Court of Appeals nevertheless found that the district courts had traditional power to grant stays in such personnel cases. Commenting upon the Government's arguments for reversal below, the court stated:

> "It is asserted that the Civil Service Commission has been given exclusive review jurisdiction.

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[11] 29 U.S.C. §§ 160(j), (l).

[12] 15 U.S.C. § 53(a).

[13] 16 U.S.C. § 825m(a).

[14] 15 U.S.C. §§ 77t(b), 78u(e).

[15] Respondent does suggest that 5 U.S.C. § 705 may confer authority to grant relief in this case. That section reads: "When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings." The relevant legislative history of that section, however, indicates that it was primarily intended to reflect existing law under the Scripps-Howard doctrine, discussed infra, and not to fashion new rules of intervention for District Courts. See S.Rep.No.752, 79th Cong., 1st Sess., 27, 44 (1945). Thus respondent's various contentions may be grouped under her primary theory discussed in the text.



> But, as noted initially, there is no statutory power in the Civil Service Commission to grant a temporary stay of discharge. Prior to the Civil Service Act a United States District Court would certainly have had jurisdiction and power to grant such temporary relief. The statute did not explicitly take it away, nor implicitly by conferring such jurisdiction and power of the CSC; we hold the District Court still has jurisdiction and may exercise the power under established standards in appropriate circumstances."[16]

If the issue were to turn solely on the earlier decisions of this Court examining the authority of federal courts to intervene in disputes about governmental employment, we think this assumption of the Court of Appeals is wrong. In Keim v. United States, 177 U.S. 290, 20 S.Ct. 574, 44 L.Ed. 774 (1900), this Court held that the Court of Claims had no authority to award damages to an employee who claimed he had been wrongfully discharged by his federal employer.[17] In White v. Berry, 171

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[16] 149 U.S.App.D.C., at 265, 462 F.2d, at 880 (footnotes omitted.)

[17] The Court there expressed the traditional judicial deference to administrative processes in the following terms: "The appointment to an official position in the Government, even if it be simply a clerical position, is not a mere ministerial act, but one involving the exercise of judgment. The appointing power must determine the fitness of the applicant; whether or not he is the proper one to discharge the duties of the position. Therefore it is one of those acts over which the courts have no general supervising power. "In the absence of specific provision to the contrary, the power of removal from office is incident to the power of appointment. 'It cannot for a moment be admitted that it was the intention of the Constitution that those offices

U.S. 366, 18 S.Ct. 917, 43 L.Ed. 199 (1898), a Government employee had sought to enjoin his employer from dismissing him from office, alleging that the removal would violate both the Civil Service Act and the applicable regulations.[18] The Circuit Court assumed jurisdiction and issued an order prohibiting the defendant from interfering with the plaintiff's discharge of his duty "until he shall be removed therefrom by proper proceedings had under the civil service act, and the rules and regulations made thereunder, or by judicial proceedings at law. . . . "[19]

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which are denominated inferior offices should be held during life. And if removable at pleasure, by whom is such removal to be made? In the absence of all constitutional provision or statutory regulation it would seem to be a sound and necessary rule to consider the power of removal as incident to the power of appointment.' In re Hennen, 13 Pet. 230, 259 [10 L.Ed. 138]; Parsons v. United States, 167 U.S. 324 [17 S.Ct. 880, 42 L.Ed. 185]. Unless, therefore, there be some specific provision to the contrary, the action of the Secretary of the Interior in removing the petitioner from office on account of inefficiency is beyond review in the courts either by mandamus to reinstate him or by compelling payment of salary as though he had not been removed." 177 U.S., at 293-294, 20 S.Ct., at 575.

[18] The plaintiff in White protested that he was being discharged because of his political affiliation, a basis for discharge specifically prohibited under the Civil Service rules. 171 U.S., at 367-368, 18 S.Ct., at 917-918. Such a contention obviously went to the heart of the Civil Service legislation, since a primary purpose of that system was to remove large sectors of Government employment from the political "spoils system" which had previously played a large part in the selection and discharge of Government employees. See generally H. Kaplan, The Law of Civil Service 1-22 (1958).

[19] 171 U.S., at 374-375, 18 S.Ct., at 920.



This Court reversed. Discussing the apparently well-established principle that " 'a court of equity will not, by injunction, restrain an executive officer from making a wrongful removal of a subordinate appointee,' "[20] the Court held that "the circuit court, sitting in equity, was without jurisdiction to grant the relief asked."[21]

Respondent's case, then, must succeed, if at all, despite earlier established principles regarding equitable intervention in disputes over tenure of governmental employees, and not because of them. Much water has flowed over the dam since 1898, and cases such as Service v. Dulles, 354 U.S. 363, 77 S.Ct. 1152, 1 L.Ed.2d 1403 (1957), cited by the District Court in its memorandum opinion in this case, establish that federal courts do have authority to review the claim of a discharged governmental employee that the agency effectuating the discharge has not followed administrative regulations.[22] In

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[20] The Court quoted from Morgan v. Nunn, 84 F. 551 (CCMD Tenn.1898), and noted that "[s]imilar decisions have been made in other circuit courts of the United States." 171 U.S., at 377-378, 18 S.Ct., at 921.

[21] Id., at 378, 18 S.Ct., at 922.

[22] In Service an employee discharged under the provisions of the McCarran rider, 65 Stat. 581, contended that the Secretary of State had not followed departmental regulations in effecting his dismissal. This Court agreed with plaintiff's position and decided that his "dismissal cannot stand." 354 U.S., at 388, 77 S.Ct., at 1165. However, the employee in that case had made a full effort to secure administrative review of his discharge prior to filing suit in the District Court. These efforts, as the Court noted, id., at 370, 77 S.Ct., at 1156, had "proved unsuccessful." In the present case petitioner has petitioned the court before ascertaining whether administrative relief will be granted.

that case, however, judicial proceedings were not commenced until the administrative remedy had been unsuccessfully pursued.[23] The fact that Government personnel decisions are now ultimately subject to the type of judicial review sought in Service v. Dulles, supra, does not, without more, create the authority to issue interim injunctive relief which was held lacking in cases such as White v. Berry, supra.

The Court of Appeals found support for its affirmance of the District Court's grant of injunctive relief in Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4, 62 S.Ct. 875, 86 L.Ed. 1229 (1942). In Scripps-Howard the licensee of a Cincinnati radio station petitioned the FCC to vacate an order permitting a Columbus radio station to change its frequency and to increase its broadcasting power. The licensee also requested a hearing. When the Commission denied the petition, the licensee filed a statutory appeal in the Court of Appeals for the District of Columbia Circuit and, in conjunction with the docketing of the appeal, asked the court to stay the FCC order pending its decision. The Court of Appeals, apparently departing from a longstanding policy of issuing such stays,[24]

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[23] See n. 22, supra.

[24] The Court pointed out that "even though the Radio Act of 1927 contained no provisions dealing with the authority of the Court of Appeals for the District of Columbia to stay orders of the Commission on appeal, the Court had been issuing stays as a matter of course wherever they were found to be appropriate, without objection by the Commission." Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4, 13, 62 S.Ct. 875, 881, 86 L.Ed. 1229 (1942).



declined to do so in this case and ultimately certified the question of its power to this Court.[25]

This Court held that the Court of Appeals had power to issue the stay, analogizing it to the traditional stay granted by an appellate court pending review of an inferior court's decision: "It has always been held, therefore, that, as part of its traditional equipment for the administration of justice,[*] a federal court can stay the enforcement of a judgment pending the outcome of an appeal."[26]

But in Scripps-Howard the losing party before the agency sought an interim stay of final agency action pending statutory judicial review.[27] A long progression of cases in this Court had established the authority of a

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[25] The precise question certified was: " 'Where, pursuant to the provisions of Section 402(b) of the Communications Act of 1934, an appeal has been taken, to the United States Court of Appeals, from an order of the Federal Communications Commission, does the court, in order to preserve the status quo pending appeal, have power to stay the execution of the Commission's order from which the appeal was taken, pending the determination of the appeal?' " Id., at 6, 62 S.Ct., at 878. The wording of the question certified makes clear that the Court was faced only with the situation in which an appeal has been filed seeking review of completed agency action.

[26] Id., at 9-10, 62 S.Ct., at 880. In the Court's opinion a footnote, herein designated with an asterisk, referred to the All Writs Act, 28 U.S.C. § 1651(a), which reads: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." The reliance of the Court on this provision was noted by the Court of Appeals in its opinion in this case. 149 U.S.App.D.C., at 261 n. 17, 462 F.2d, at 876 n. 17.

[27] See n. 25, supra.

court, empowered by statute to exercise appellate jurisdiction, to issue appropriate writs in aid of that jurisdiction.[28]

The All Writs Act, first enacted as a part of the Judiciary Act of 1789, provided statutory confirmation of this authority.[29] This Court in Scripps-Howard held that the same principles governed the authority of courts charged by statute with judicial review of agency decisions, and that the authority to grant a stay exists in such a court even though not expressly conferred by the statute which confers appellate jurisdiction.

Scripps-Howard, supra, of course, is not the instant case. The authority of the District Court to review agency action under Service v. Dulles, supra, does not come into play until it may be authoritatively said that the administrative decision to discharge an employee does in fact fail to conform to applicable regulations.[30] Until administrative action has become final, no court is in a position to

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[28] For example, the two cases cited by the Court in Scripps-Howard involved situations in which a court accepted appeal jurisdiction and, in connection with that acceptance, issued a stay of the decision below. See In re Classen, 140 U.S. 200, 11 S.Ct. 735, 35 L.Ed. 406 (1891) (writ of error to this Court); In re McKenzie, 180 U.S. 536, 21 S.Ct. 468, 45 L.Ed. 657 (1901) (appeal taken to the Circuit Court of Appeals). The All Writs Act, n. 26, supra, provided the authority in each case.

[29] See n. 26, supra.

[30] See n. 22, supra. As noted above, the employee in Service sought to have the Secretary's action declared invalid within the administrative system. He sought judicial relief only after it became evident that no administrative relief would be forthcoming.



say that such action did or did not conform to applicable regulations. Here respondent had obtained no administrative determination of her appeal at the time she brought the action in the District Court. She was in effect asking that court to grant her, on an interim basis, relief which the administrative agency charged with review of her employer's action could grant her only after it had made a determination on the merits.

While both the District Court and the Court of Appeals characterized the District Court's intervention as a "stay," the mandatory retention of respondent in the position from which she was dismissed actually served to provide the most extensive relief which she might conceivably obtain from the agency after its review on the merits. It may well be that the Civil Service Commission, should it have agreed with respondent's version of the basis for her dismissal, would prohibit the final separation of respondent unless and until proper procedures had been followed. But this is not to say that it would hold respondent to be entitled to full reinstatement with the attendant tension with her superiors that the agency intended to avoid by dismissing her. Congress has provided that a wrongfully dismissed employee shall receive full payment and benefits for any time during which the employee was wrongfully discharged from employment.[31] The Civil Service Commission could conceivably

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[31] The Back Pay Act is found at 5 U.S.C. § 5596. The pertinent provisions read: "(b) An employee of an agency who, on the basis of an administrative determination or a timely appeal, is found by appropriate authority under applicable law or regulation to have undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or

accommodate the conflicting claims in this case by directing respondent's superiors to provide her with an opportunity to reply by affidavit, and by ordering that she receive backpay for any period of her dismissal prior to the completion of the type of dismissal procedure required by the regulations.

The Court in Scripps-Howard recognized that certain forms of equitable relief could not properly be granted by federal courts. The Court specifically contrasted the stay of a license grant and the stay of a license denial, finding that the latter would have no effect:

> "Of course, no court can grant an applicant an authorization which the Commission has refused. No order that the Court of Appeals could make would enable an applicant to go on the air when the Commission has denied him a license to do so. A stay of an order denying an application would in the nature of things stay nothing. It could not operate as an affirmative authorization of that which the Commission has refused to authorize."[32]

Surely that conclusion would not vary depending upon whether the radio station had started broadcasting on its own initiative and sought to stay a Commission order directing it to cease. Yet here the District Court did

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reduction of all or a part of the pay, allowances, or differentials of the employee – "(1) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect an amount equal to all or any part of the pay, allowances, or differentials, as applicable, that the employee normally would have earned during that period if the personnel action had not occurred, less any amounts earned by him through other employment during that period. . . . "

[32] 316 U.S., at 14, 62 S.Ct., at 882.



authorize, on an interim basis, relief which the Civil Service Commission had neither considered nor authorized – the mandatory reinstatement of respondent in her Government position. We are satisfied that Scripps-Howard, involving as it did the traditional authority of reviewing courts to grant stays, provides scant support for the injunction issued here.

The Court of Appeals also relied upon FTC v. Dean Foods Co., 384 U.S. 597, 86 S.Ct. 1738, 16 L.Ed.2d 802 (1966), in reaching its decision. There a closely divided Court held that a Court of Appeals having ultimate jurisdiction to review orders of the Federal Trade Commission might, upon the Commission's application,[33] grant a temporary injunction to preserve the controversy before the agency. The Commission's application alleged,[34] and the

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[33] A preliminary question of importance in Dean Foods was whether the Commission, in the absence of express statutory authorization, could petition the Court of Appeals for preliminary relief. This Court said: "[T]he Commission is a governmental agency to which Congress has entrusted, inter alia, the enforcement of the Clayton Act, granting it the power to order divestiture in appropriate cases. At the same time, Congress has given the courts of appeals jurisdiction to review final Commission action. It would stultify congressional purpose to say that the Commission did not have the incidental power to ask the courts of appeals to exercise their authority derived from the All Writs Act." 384 U.S., at 606, 86 S.Ct., at 1743. A contrary decision, the Court felt, would have made it virtually impossible for the Commission itself to undertake review of the proposed merger. The congressional grant of authority to the FTC in Clayton Act cases thus could have been frustrated.

[34] Id., at 599-600, 86 S.Ct., at 1740-1741. The complaint charged that one of the parties to the merger " 'as an entity will no longer exist,' " id., at 599, 86 S.Ct., at 1740, and that

court accepted,[35] that refusal to grant the injunction would result in the practical disappearance of one of the entities whose merger the Commission sought to challenge. The disappearance, in turn, would mean that the agency, and the court entrusted by statute with authority to review the agency's decision, would be incapable of implementing their statutory duties by fashioning effective relief. Thus invocation of the All Writs Act, as a preservative of jurisdiction, was considered appropriate.

Neither the reviewing jurisdiction of the Civil Service Commission nor that of the District Court would be similarly frustrated by a decision of the District Court remitting respondent to her administrative remedy. Certainly the Civil Service Commission will be able to weigh respondent's contentions and to order necessary relief without the aid of the District Court injunction. In direct contrast to the claim of the FTC in Dean Foods that its jurisdiction would be effectively defeated by denial of relief, the Commission here has argued that judicial action interferes with the normal agency processes.[36] And

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"consummation of the agreement would 'prevent the Commission from devising, or render it extremely difficult for the Commission to devise, any effective remedy after its decision on the merits.' " Id., at 600, 86 S.Ct., at 1740. The Commission therefore was affirmatively asserting that the administrative remedy which it was authorized to fashion was inadequate.

[35] Id., at 601, 86 S.Ct., at 1740.

[36] In Dean Foods the Commission confessed its inability to fashion effective administrative relief. But petitioners here admit no such thing. Rather they strongly assert that the Back Pay Act, n. 31, supra, provides a complete remedy for any procedural irregularities which may have occurred in this case.



we see nothing in the record to suggest that any judicial review available under the doctrine of Service v. Dulles would be defeated in the same manner as review in Dean Foods.

We are therefore unpersuaded that the temporary injunction granted by the District Court in this case was justified either by our prior decisions dealing with the availability of injunctive relief to discharged federal employees, or by those dealing with the authority of reviewing courts to grant temporary stays or injunctions pending full appellate review. If the order of the District Court in this case is to be upheld, the authority must be found elsewhere.

III

This Court observed in Scripps-Howard that "[t]he search for significance in the silence of Congress is too often the pursuit of a mirage," 316 U.S., at 11, 62 S.Ct., at 880, 86 L.Ed. 1229, and this observation carries particular force when a statutory scheme grants broad regulatory latitude to an administrative agency. In Scripps-Howard a careful review of the relevant statutory provisions and legislative history persuaded this Court that Congress had not intended to nullify the power of an appellate court,[37] having assumed jurisdiction after an agency decision, to issue stays in aid of its jurisdiction. The Court noted, in particular, that stays were allowed in other

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[37] 316 U.S., at 11-13, 62 S.Ct., at 880-881.

cases processed through the FCC[38] and that the Court of Appeals had routinely issued stays in similar cases before undertaking an unexpected shift in policy.[39] But, at the other end of the spectrum, in Arrow Transportation Co. v. Southern R. Co., 372 U.S. 658, 83 S.Ct. 984, 10 L.Ed.2d 52 (1963), this Court held that a specific congressional grant of power to the ICC to suspend proposed rate modifications precluded the District Court from extending the suspension by temporary injunction. This was true despite arguments that district courts traditionally had such power and that Congress did not explicitly revoke the power by statute.[40]

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[38] The Court compared the provisions of §§ 402(a) and 402(b) of the Communications Act of 1934, 48 Stat. 1064. The former section specifically authorized temporary stays, through application of the Urgent Deficiencies Appropriation Act of Oct. 22, 1913, 38 Stat. 208, of orders of the Federal Communications Commission which were under review – with certain exceptions. Those exceptions, which included the order there at issue, were treated under § 402(b) which made no specific provision for such stays. The Court thus was required to consider whether Congress deliberately sought to deprive courts of a power in those cases not governed by the Urgent Deficiencies Act which had been expressly authorized for those cases which were governed by the Act.

[39] See n. 24, supra.

[40] Although acknowledging that the legislative history did not clearly establish 'a design to extinguish whatever judicial power may have existed prior to 1910 to suspend proposed rates,' the Court concluded: '(w)e cannot suppose that Congress, by vesting the new suspension power in the Commission, intended to give backhanded approval to the exercise of a judicial power which had brought the whole problem to a head.' 372 U.S., at 664, 83 S.Ct., at 987.



The Court there said: "The more plausible inference is that Congress meant to foreclose a judicial power to interfere with the timing of rate changes which would be out of harmony with the uniformity of rate levels fostered by the doctrine of primary jurisdiction."[41]

The overall scheme governing employees of the Federal Government falls neatly within neither of these precedents. Unlike Scripps-Howard, traditional stay practice lends little support to the sort of relief which the District Court granted respondent here, and the precedents dealing with the availability of equitable relief to discharged Government employees are quite unfavorable to respondent. Unlike Arrow Transportation, supra, the administrative structure is far more a creature of agency regulations than of statute. We are thus not prepared to conclude that Congress in this class of cases has wholly divested the district courts of their customary authority to grant temporary injunctive relief, and to that extent we agree with the Court of Appeals. But merely because the factors relied upon by the Government do not establish that the district courts are wholly bereft of the authority claimed for them here does not mean, as the Court of Appeals appeared to believe, that temporary injunctive relief in this class of cases is to be dispensed without regard to those factors. While considerations similar to those found sufficient in Arrow Transportation to totally deprive the district courts of equitable authority do not have that force here, they nonetheless are entitled to great weight in the equitable balancing process which attends the grant of injunctive relief.

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[41] Id., at 668, 83 S.Ct., at 990. (Emphasis in original.)

We are dealing in this case not with a permanent Government employee, a class for which Congress has specified certain substantive and procedural protections,[42] but with a probationary employee, a class which Congress has specifically recognized as entitled to less comprehensive procedures. Title 5 U.S.C. § 3321, derived from the original Pendleton Act,[43] requires the creation of this classification:

"The President may prescribe rules which shall provide, as nearly as conditions of good administration warrant, that there shall be a period of probation before an appointment in the competitive service becomes absolute." It is also clear from other provisions in the Civil Service statutory framework that Congress expected probationary employees to have fewer procedural rights than permanent employees in the competitive service. For example, preference eligibles,[44] commonly veterans, are entitled to hearing procedures extended to persons in the competitive service only after they have completed "a probationary or trial period."[45] Persons suspended for

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[42] See 5 U.S.C. § 7501.

[43] 22 Stat. 404.

[44] See 5 U.S.C. § 2108(3).

[45] 5 U.S.C. §§ 7511, 7512. Section 7511 defines a "preference eligible employee" as "a permanent or indefinite preference eligible who has completed a probationary or trial period as an employee of an Executive agency or as an individual employed by the government of the District of Columbia . . . ," subject to certain exceptions. Section 7512 provides that such an employee must receive written notice of the reasons for proposed adverse action, a chance to reply in writing and by affidavit, and notice of an adverse decision. A probationary employee, under the regulations, has more limited rights. See 5 CFR § 315.801 et seq.



national security reasons are given expanded protection provided they have completed a trial or probationary period.[46]

The Civil Service regulations are consistent with these statutes. These regulations are promulgated by the Civil Service Commission as authorized by Congress in 5 U.S.C. §§ 1301-1302.[47] Part 752, the regulations governing adverse agency actions, provides certain procedural safeguards for employees but, as did the statutes cited above, exempts "employee[s] currently serving a probationary or trial period."[48] Such employees are remitted to the procedures specified in subpart H of Part 315,[49] the procedures at issue here. Under § 752.202 of the regulations permanent competitive service employees are to be retained in an active-duty status only during the required 30-day-notice period, and the Commission is given no authority to issue additional stays.[50] It cannot prevent the

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[46] 5 U.S.C. § 7532(c)(2).

[47] Title 5 U.S.C. § 3301 et seq., grants to the President authority to promulgate rules and regulations governing the Civil Service. Title 5 U.S.C. § 1301 provides that "[t]he Civil Service Commission shall aid the President, as he may request, in preparing the rules he prescribes under this title for the administration of the competitive service." Title 5 U.S.C. § 1302 empowers the Commission to prescribe regulations, "subject to the rules prescribed by the President . . . ."

[48] 5 CFR § 752.103(a)(5).

[49] 5 CFR § 315.801 et seq.

[50] Title 5 CFR § 752.202(d) reads in part: "Except as provided in paragraph (e) of this section, an employee against whom adverse action is proposed is entitled to be retained in an active duty status during the notice period." Section 752.202(a)(1) provides that "at least 30 full days' advance written notice" is required.

dismissal of an employee or order his reinstatement prior to hearing and determining his appeal on the merits. Reasonably, a probationary employee could be entitled to no more than retention on active duty for the period preceding the effective date of his discharge.

Congress has also provided a broad remedy for cases of improper suspension or dismissal. The Back Pay Act of 1948[51] supplemented the basic Lloyd-LaFollette Act of 1912 and provided that any person in the competitive Civil Service who was unjustifiably discharged and later restored to his position was entitled to full backpay for the time he was out of work. The benefits of this Act were extended to additional employees, including probationary employees, in 1966.[52] Respondent was eligible for full compensation for any period of improper discharge under this section.

As we have noted, respondent's only substantive claim, either before the District Court or in her administrative appeal, was that petitioners had violated the regulations promulgated by the Civil Service Commission. Those same regulations provided for an appeal to the agency which promulgated the regulations and further provided that until that appeal had been heard on the merits, the employer's discharge of the employee was to remain in effect. Respondent, however, sought judicial intervention before fully utilizing the administrative scheme.

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[51] See n. 31, supra.

[52] 80 Stat. 94, 95.



The District Court, exercising its equitable powers, is bound to give serious weight to the obviously disruptive effect which the grant of the temporary relief awarded here was likely to have on the administrative process. When we couple with this consideration the historical denial of all equitable relief by the federal courts in cases such as White v. Berry, 171 U.S. 366, 18 S.Ct. 917, 43 L.Ed. 199 (1898), the well-established rule that the Government has traditionally been granted the widest latitude in the "dispatch of its own internal affairs," Cafeteria and Restaurant Workers Union, Local 473, A.F.L.-C.I.O. v. McElroy, 367 U.S. 886, 896, 81 S.Ct. 1743, 1749, 6 L.Ed.2d 1230 (1961), and the traditional unwillingness of courts of equity to enforce contracts for personal service either at the behest of the employer or of the employee, 5A A. Corbin, Contracts (1964), § 1204, we think that the Court of Appeals was quite wrong in routinely applying to this case the traditional standards governing more orthodox "stays." See Virginia Petroleum Jobbers Assn. v. FPC, 104 U.S.App.D.C. 106, 259 F.2d 921 (1958).[53] Although we do not hold that Congress has wholly foreclosed the granting of preliminary injunctive relief in such cases, we do believe that respondent at the very least must make a showing of irreparable injury sufficient in kind and

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[53] These considerations were set forth by the majority below as follows: "(1) Has the petitioner made a strong showing that he is likely to prevail on the merits of his appeal? (2) Has the petitioner shown that without such relief he will be irreparably injured? (3) Would the issuance of a stay substantially harm other parties interested in the proceedings? (4) Where lies the public interest?" 149 U.S.App.D.C., at 263, 462 F.2d, at 878.

degree to override these factors cutting against the general availability of preliminary injunctions in Government personnel cases. We now turn to the showing made to the District Court on that issue, and to the Court of Appeals' treatment of it.

IV

The Court of Appeals said in its opinion:

> "Without passing on the merits of Mrs. Murray's contention that she will suffer irreparable harm if the sought-for-relief is not granted (a task for the District Court here), we note that there was a determination that such a loss of employment could be 'irreparable harm' in Reeber v. Rossell, [D.C., 91 F.Supp. 108] (1950), a case quite similar to that at bar. We agree with the Reeber court that such a loss of employment can amount to irreparable harm, and that injunctive relief may be a proper remedy pending the final administrative determination of the validity of the discharge by the Civil Service Commission."[54]

At another point in its opinion, the Court of Appeals said: "As the District Court here felt that the hearing on the motion for the preliminary injunction could not be completed until Mr. Sanders was produced to testify, it was proper for him to continue the stay, in order to preserve the status quo pending the completion of the hearing."[55]

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[54] Id., at 266, 462 F.2d, at 877 (emphasis in original).

[55] Id., at 265, 462 F.2d, at 880.



The court in its supplemental opinion filed after the Government's petition for rehearing further expanded its view of this aspect of the case: "The court's opinion does not hold, and the trial judge has not yet held, that interim relief is proper in Mrs. Murray's case, but we do hold that the trial judge may consider granting such relief, as this is inherent in his historical equitable role."[56]

In form the order entered by the District Court now before us is a continuation of the temporary restraining order originally issued by that court.[57] It is clear from the Court of Appeals' opinion that that court so construed it. But since the order finally settled upon by the District Court was in no way limited in time, the provisions of Fed.Rule Civ.Proc. 65 come into play. That Rule states, in part:

> "(b) . . . A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition. . . . Every temporary restraining order granted without notice . . . shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause

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[56] Id., at 270, 462 F.2d, at 885 (emphasis in original).

[57] See n. 8, supra.

shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period."

The Court of Appeals whose judgment we are reviewing has held that a temporary restraining order continued beyond the time permissible under Rule 65 must be treated as a preliminary injunction, and must conform to the standards applicable to preliminary injunctions. National Mediation Board v. Air Line Pilots Assn., 116 U.S.App.D.C. 300, 323 F.2d 305 (1963). We believe that this analysis is correct, at least in the type of situation presented here, and comports with general principles imposing strict limitations on the scope of temporary restraining orders.[58] A district court, if it were able to

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[58] The Court of Appeals for the Second Circuit, in an opinion cited by the Court of Appeals for the District of Columbia Circuit in National Mediation Board v. Air Line Pilots Assn., 116 U.S.App.D.C. 300, 323 F.2d 305 (1963), described these principles as follows: "It is because the remedy is so drastic and may have such adverse consequences that the authority to issue temporary restraining orders is carefully hedged in Rule 65(b) by protective provisions. And the most important of these protective provisions is the limitation on the time during which such an order can continue to be effective. "It is for the same reason, the possibility of drastic consequences which cannot later be corrected, that an exception is made to the final judgment rule to permit review of preliminary injunctions. 28 U.S.C. § 1292(a)(1). To deny review of an order that has all the potential danger of a preliminary injunction in terms of duration, because it is issued without a preliminary adjudication of the basic rights involved, would completely defeat the purpose of this provision. "We hold, therefore, that the continuation of the temporary restraining order beyond the period of statutory authorization, having, as it does, the same practical effect as the issuance of a preliminary injunction, is



shield its orders from appellate review merely by designating them as temporary restraining orders, rather than as preliminary injunctions, would have virtually unlimited authority over the parties in an injunctive proceeding. In this case, where an adversary hearing has been held, and the court's basis for issuing the order strongly challenged, classification of the potentially unlimited order as a temporary restraining order seems particularly unjustified. Therefore we view the order at issue here as a preliminary injunction.

We believe that the Court of Appeals was quite wrong in suggesting that at this stage of the proceeding the District Court need not have concluded that there was

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appealable within the meaning and intent of 28 U.S.C § 1292(a)(1)." Pan American World Airways, Inc. v. Flight Engineers' Intern. Assn., etc., 306 F.2d 840, 843 (CA2 1962). (Citations omitted; emphasis in original.) Our Brother MARSHALL, in his dissenting opinion, nevertheless suggests that a district court can totally or partially impede review of an indefinite injunctive order by failing to make any findings of fact or conclusions of law. It would seem to be a consequence of this reasoning that an order which neglects to comply with one rule may be saved from the normal appellate review by its failure to comply with still another rule. We do not find this logic convincing. Admittedly, the District Court did not comply with Fed.Rule Civ.Proc. 52(a), but we do not think that we are thereby foreclosed from examining the record to determine if sufficient allegations or sufficient evidence supports the issuance of injunctive relief. As discussed below, nothing in the pleadings or affidavits or in the testimony at the hearing before the District Court, demonstrates that this is an extraordinary case supporting the award of judicial relief. See n. 68, infra.

actually irreparable injury.[59] This Court has stated that "[t]he basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies," Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 506-507, 79 S.Ct. 948, 954, 3 L.Ed.2d 988 (1959), and the Court of Appeals itself in Virginia Petroleum Jobbers Assn. v. FPC, 104 U.S.App.D.C. 106, 259 F.2d 921 (1958), has recognized as much. Yet the record before us indicates that no witnesses were heard on the issue of irreparable injury, that respondent's complaint was not verified, and that the affidavit she submitted to the District Court did not touch in any way upon considerations relevant to irreparable injury.[60] We are therefore somewhat puzzled

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[59] We note that Rule 65 requires a showing of irreparable injury for the issuance of a temporary restraining order as well. Therefore, for the purposes of this part of the discussion, it would make no difference that the order was styled a temporary restraining order rather than a preliminary injunction.

[60] The affidavit in its entirety states: "JEANNE M. MURRAY, being first duly sworn, deposes as follows: "1. I am presently employed by the Public Buildings Service of the General Services Administration (GSA) as a Program Analyst, GS – 13. "2. On May 20, 1971, at approximately five p.m., I was given a letter signed by Mr. W. H. Sanders, Acting Commissioner of the Public Buildings Service, informing me that my employment was to be terminated as of Saturday, May 29, 1971. "3. I have never been told that GSA's Personnel files contain adverse information about my service in the Defense Intelligence Agency (DIA), nor have I ever seen a memorandum dealing with my employment there. "4. I worked for slightly over a year at the DIA, and I have been informed by the Acting Chief of Staff of the DIA, Rear Admiral D. E. Bergin, that my personnel file at DIA contains nothing derogatory to me. "5. In recent weeks, I was informed by Mr. William Mulroney, a DIA



about the basis for the District Court's conclusion that respondent "may suffer immediate and irreparable injury." The Government has not specifically urged this procedural issue here, however, and the Court of Appeals in its opinion discussed the elements upon which it held that the District Court might base a conclusion of irreparable injury. Respondent's unverified complaint alleged that she might be deprived of her income for an indefinite period of time, that spurious and unrebutted charges against her might remain on the record, and that she would suffer the embarrassment of being wrongfully discharged in the presence of her co-workers.[61] The Court of Appeals intimated that either loss of earnings or damage to reputation might afford a basis for a finding of irreparable injury and provide a basis for temporary injunctive relief.[62] We disagree.[63]

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employee, that someone from GSA had been making inquiries of DIA personnel about my term of service there."

[61] Complaint, par. 12.

[62] 149 U.S.App.D.C., at 262, 462 F.2d, at 877.

[63] The Court of Appeals held that the Government's failure to produce witness Sanders, after the District Court chose to hear him orally, rather than to rely on his affidavit, allowed the District Court to continue the temporary restraining order until Sanders appeared. We have no doubt that a district court in appropriate circumstances may be justified in resolving against a party refusing to produce a witness under his control the relevant issues upon which that witness' testimony might have touched. But it is clear from the record that the testimony of the witness Sanders was desired to test the basis upon which respondent was discharged, testimony which, of course, would go to the issue of respondent's ultimate chances for success on the merits. While the District Court may well have been entitled to resolve that issue against the Government at that stage of the

Even under the traditional standards of Virginia Petroleum Jobbers, supra, it seems clear that the temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury.[64] In that case the court stated:

> "The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm."[65]

This premise is fortified by the Back Pay Act discussed above.[66] This Act not only affords monetary relief which will prevent the loss of earnings on a periodic

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proceeding, this conclusion in no way dispenses with the necessity for a conclusion that irreparable injury will occur, since that is a separate issue that must be proved to the satisfaction of the Court by the person seeking equitable relief.

[64] It should be noted that Virginia Petroleum Jobbers dealt with a fact situation quite dissimilar to this one. There the Federal Power Commission had denied petitioner leave to intervene in proceedings before the Commission. In conjunction with appeal of that decision the petitioner had filed a "motion for a stay of further proceedings pending completion of [the Court's] review of the Commission's orders denying intervention or rehearing." 104 U.S.App.D.C., at 109, 259 F.2d, at 924. Such a fact situation was far closer to the traditional situation in which equity powers have been employed to grant a stay pending appeal than is the situation involved in the instant case.

[65] Id., at 110, 259 F.2d, at 925 (emphasis in original).

[66] N. 31, supra.



basis from being "irreparable injury" in this type of case, but its legislative history suggests that Congress contemplated that it would be the usual, if not the exclusive, remedy for wrongful discharge. The manager of the bill on the floor of the Senate, Senator Langer, commented on the bill at the time of its passage:

> "[It] . . . provides that an agency or department of the Government may remove any employee at any time, but that the employee shall then have a right of appeal. When he is removed, he is of course off the pay roll. If he wins the appeal, it is provided that he shall be paid for the time during which he was suspended."[67]

Respondent's complaint also alleges, as a basis for relief, the humiliation and damage to her reputation which may ensue. As a matter of first impression it would seem that no significant loss of reputation would be inflicted by procedural irregularities in effectuating respondent's discharge, and that whatever damage might occur would be fully corrected by an administrative determination requiring the agency to conform to the applicable regulations. Respondent's claim here is not that she could not as a matter of statutory or administrative right be discharged, but only that she was entitled to additional procedural safeguards in effectuating the discharge.

Assuming for the purpose of discussion that respondent had made a satisfactory showing of loss of income and had supported the claim that her reputation would be damaged as a result of the challenged agency action,

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[67] 94 Cong.Rec. 6681 (1948).

we think the showing falls far short of the type of irreparable injury which is a necessary predicate to the issuance of a temporary injunction in this type of case.[68] We therefore reverse the decision of the Court of Appeals which approved the action of the District Court.

It is so ordered.

Mr. Justice DOUGLAS, dissenting.

I think with all respect that while the narrow isolated issue involved in this litigation is exposed in the opinion of the Court the nature of the problem is not.

Respondent, a probationary employee, claims that her discharge was not based exclusively on her work as a probationary employee. If it were based on her work as probationary employee, the procedure is quite summary and her right of appeal to the Civil Service Commission is

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[68] We recognize that cases may arise in which the circumstances surrounding an employee's discharge, together with the resultant effect on the employee, may so far depart from the normal situation that irreparable injury might be found. Such extraordinary cases are hard to define in advance of their occurrence. We have held that an insufficiency of savings or difficulties in immediately obtaining other employment – external factors common to most discharged employees and not attributable to any unusual actions relating to the discharge itself – will not support a finding of irreparable injury, however severely they may affect a particular individual. But we do not wish to be understood as foreclosing relief in the genuinely extraordinary situation. Use of the court's injunctive power, however, when discharge of probationary employees is an issue, should be reserved for that situation rather than employed in the routine case. See also Wettre v. Hague, 74 F.Supp. 396 (D.C.Mass.1947); vacated and remanded on other grounds, 168 F.2d 825 (CA1 1948).



limited to only a few grounds such as discrimination based on race, color, religion, sex, or national origin, 5 CFR § 315.806. But her claim is that her discharge was based, at least in part, on conduct prior to her federal employment. In case that prior conduct is the basis of the discharge, the employee is entitled to advance notice of proposed termination, an opportunity to respond in writing with supporting affidavits, and notice of any adverse decisions on or prior to the effective date of the termination, 5 CFR § 315.805.

The Congress in 1966 provided that all wrongfully discharged federal employees, including probationary employees are entitled to backpay, 5 U.S.C § 5596, and the Court concludes that that is the employee's exclusive remedy.

But where an agency has terminated employment and the employee appeals to the Civil Service Commission, the Commission has no power to issue a stay of the agency's action. This is, therefore, not a case where the employee has gone to the courts for relief which the Commission could have granted but refused to do so. Nor is respondent challenging the Civil Service law; nor is she asking for a ruling on the merits of her claim; nor did the District Court, whose judgment was affirmed by the Court of Appeals, act in derogation of the administrative process. Rather, it protected that process by staying the discharge until the Commission had ruled on the appeal.

The power to issue a stay is inherent in judicial power and as indicated by the Court rests on the exercise of an informed discretion on a showing of irreparable

injury to the applicant or to the public interest, Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4, 14, 62 S.Ct. 875, 882, 86 L.Ed. 1229. That doctrine is not limited, as the Department of Justice suggests, to issuance of stays by a court only after an appeal has been taken. We held in Federal Trade Commission v. Dean Foods Co., 384 U.S. 597, 603-604, 86 S.Ct. 1738, 1742-1743, 16 L.Ed.2d 802, that the All Writs Act, 28 U.S.C. § 1651, which empowers federal courts to " 'issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law,' " extends to "potential jurisdiction of the appellate court where an appeal is not then pending but may be later perfected." The District Court has at least a limited review of the Commission, Norton v. Macy, 135 U.S.App.D.C. 214, 217, 417 F.2d 1161, 1164; Dozier v. United States, 473 F.2d 866 (CA5). Hence the All Writs Act justified its power to grant a stay.

We have, therefore, a case where a stay supplements and does not curtail administrative power, the Commission having no authority to grant that relief. The District Court power preserves the status quo, does not pass on the merits of the controversy, and limits its stay to the date when the merits of the discharge are adjudicated by the Commission. I agree with the Court that that order was appealable.

A point is made that respondent has not shown irreparable injury. That misstates the issue. The District Court issued a stay pending a hearing on whether a temporary injunction should issue. The hearing, if held, would encompass two issues: (1) whether the grounds for respondent's discharge antedated her present employment (see 149 U.S.App.D.C. 256, 269, 462 F.2d 871, 884)



and were not restricted to her record as a probationary employee;[1] and (2) whether she would suffer irreparable injury. As stated by the Court of Appeals, respondent "may show . . . irreparable damage, if the hearing before Judge Gasch is allowed to proceed to a decision." Id., at 269, 462 F.2d, at 884. The stay was issued by the District Court only because the federal agency involved refused to produce as a witness the officer who had decided to discharge respondent. Both the District Court and the Court of Appeals were alert to the necessity to show irreparable injury before an injunction issues.

On that issue there is more than meets the eye.

Employability is the greatest asset most people have. Once there is a discharge from a prestigious federal agency, dismissal may be a badge that bars the employee from other federal employment. The shadow of that discharge is cast over the area where private employment may be available. And the harm is not eliminated by the possibility of reinstatement, for in many cases the ultimate absolution never catches up with the stigma of the accusation. Thus the court in Schwartz v. Covington, 341 F.2d 537, 538, issued a stay upon a finding of irreparable injury where a serviceman was to be discharged for

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[1] Where, as here, conduct prior to appointment as a probationary employee as well as conduct during the period of employment is alleged to be the basis of the discharge, the requirements of procedural due process are obvious. We said in Wieman v. Updegraff, 344 U.S. 183, 192, 73 S.Ct. 215, 219, 97 L.Ed. 216, "It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." And see Schwartz v. Covington, 341 F.2d 537, 538 (CA9 1965).

alleged homosexual activity: "[A]ppellee has shown that he will suffer irreparable damage if the stay is not granted. Irrespective of the government's recent assurance that the appellee would be reinstated if he prevails upon review of his discharge, the injury and the stigma attached to an undesirable discharge are clear." Unlike a layoff or discharge due to fortuitous circumstances such as the so-called energy crisis, a discharge on the basis of an employee's lifetime record or on the basis of captious or discriminatory attitudes of a superior may be a cross to carry the rest of an employee's life. And we cannot denigrate the importance of one's social standing or the status of social stigma as legally recognized harm. In Ah Kow v. Nunan, 5 Sawy. 552, the Circuit Court, speaking through Mr. Justice Field, held that a Chinese prisoner could recover damages from the sheriff who cut off his queue, the injury causing great mental anguish, disgrace in the eyes of friends and relatives, and ostracism from association with members of his own race.

There is no frontier where the employee may go to get a new start. We live today in a society that is closely monitored. All of our important acts, our setbacks, the accusations made against us go into data banks and are instantly retrievable by the computer.[2] An arrest goes into

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[2] With dossiers being compiled by commercial credit bureaus, state and local law enforcement agencies, the CIA, the FBI, the IRS, the Armed Services, and the Census Bureau, we live in an Orwellian age in which the computer has become "the heart of a surveillance system that will turn society into a transparent world." Miller, Computers, Data Banks and Individual Privacy: An Overview, 4 Col. Human Rights L.Rev. 1, 2 (1972). Although the subject of congressional concern, the



the data bank even though it turns out to be unconstitutional or based on mistaken identity. There is no federal procedure for erasing arrests. While they arise in 50 States as well as in the federal area, only a few States have procedures for erasing them; and that entails a long and laborious procedure.[3] Moreover, this generation grew up in the age where millions of people were screened for "loyalty" and "security"; and many were discharged from the federal service; many resigned rather than face the ordeal of the "witch hunt" that was laid upon them. Discharge from the federal service or resignation under fire became telltale signs of undesirability. Therefore, the case of irreparable injury for an unexplained discharge from federal employment may be plain enough on a hearing.

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problem is one which has thus far avoided legislative correction. See Federal Data Banks, Computers and the Bill of Rights, Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 92d Cong., 1st Sess. (1971). See also A. Miller, The Assault on Privacy (1971).

[3] Illinois provides that photographs, fingerprints, etc., be returned to unconvicted arrestees upon acquittal or release and further provides that the arrestee may petition a local court to have the record expunged by the arresting authorities. There is, however, no method for retrieving records which have been distributed to other law enforcement authorities or to private individuals. Ill.Rev.Stat., c. 38, § 206-5 (1973). Connecticut has a statute with similar shortcomings. Conn.Gen.Stat.Ann. § 54-90 (Supp.1971); see Satter & Kalom, False Arrest: Compensation and Deterrence, 43 Conn.B.J. 598, 612-613. New York's former Penal Law provided that all fingerprints, photographs, etc., of those acquitted of criminal charges had to be returned to the individual if no other criminal proceedings were pending against the individual and he had no prior convictions. N.Y.Penal Law § 516 (McKinney's Consol. Laws c. 40, 1909).

The District Court and the Court of Appeals were well within the limits of the law in granting a stay so that the issue of irreparable injury might be determined. It hardly comports with any standard for the expenditure of judicial energies to spend our time trying to find error in the exercise of the lower court's discretion to protect federal employees by giving them at least a chance to prove irreparable injury.

Mr. Justice MARSHALL, with whom Mr. Justice BRENNAN concurs, dissenting.

In my view no appealable order has been entered in this case, and both the Court of Appeals and this Court accordingly lack jurisdiction.

The orders issued by the District Court are both temporary restraining orders. The first, issued on May 28 and captioned "Temporary Restraining Order," enjoined Mrs. Murray's dismissal until the determination of her application for an injunction. The second, issued on June 4 and also captioned "Temporary Restraining Order," provides "that the Temporary Restraining Order issued by this Court at twelve o'clock p.m., May 28, 1971, is continued until the appearance of the aforesaid W. H. Sanders." At no time did the District Court indicate it was issuing anything but a temporary restraining order. During the hearing on the application for a preliminary injunction, after the court indicated it wanted to hear from Mr. Sanders in person, the Government informed the court that Mr. Sanders was then out of town on vacation. The court replied: "Let me know when he can be available." Counsel for the Government responded: "Very well." And the District Court then said: "The



T.R.O. will be continued until he shows up. . . . Tell the agency I will continue the temporary restraining order until the witness appears." Tr. 10.

It is well settled that the grant or denial of a temporary restraining order is not appealable, except in extraordinary circumstances, not present here, where the denial of the temporary restraining order actually decides the merits of the case or is equivalent to a dismissal of the suit. See generally 11 C. Wright & A. Miller, Federal Practice & Procedure § 2962, pp. 616-617 (1973), and cases there cited.

The Court holds, however, that since the temporary restraining order was extended by the District Court beyond the time limitation imposed by Fed.Rule Civ.Proc. 65(b), it became an appealable preliminary injunction. I cannot agree. Federal Rule Civ.Proc. 52(a) expressly provides that "in granting or refusing interlocutory injunctions the court shall . . . set forth the findings of fact and conclusions of law which constitute the grounds of its action." This Rule applies to preliminary injunctions, and as no findings of fact and conclusions of law have yet been filed in this case, no valid preliminary injunction was ever issued. See National Mediation Board v. Air Line Pilots Assn., 116 U.S.App.D.C. 300, 323 F.2d 305 (1963); Sims v. Greene, 160 F.2d 512 (CA3 1947).

Nor would it make sense for this Court to review the District Court's order in this case as the grant of a preliminary injunction. Where the District Court has not entered findings of fact and conclusions of law under Rule 52(a), meaningful review is well-nigh impossible. "It is of the highest importance to a proper review of the action of a

court in granting or refusing a preliminary injunction that there should be fair compliance with Rule 52(a) of the Rules of Civil Procedure." Mayo v. Lakeland Highlands Canning Co., 309 U.S. 310, 316, 60 S.Ct. 517, 520, 84 L.Ed. 774 (1940).

It is suggested that if an indefinitely extended temporary restraining order remained unappealable, the District Court would have virtually unlimited authority over the parties in an injunctive action. At the outset, this cannot justify this Court's reaching the merits of Mrs. Murray's claim for a preliminary injunction. Even if the order entered by the District Court is appealable, it should be appealable only for the purposes of holding it invalid for failure to comply with Rule 52(a). This was the precise course taken by the Court of Appeals for the District of Columbia Circuit in National Mediation Board, supra, on which the majority relies. See also Sims v. Greene, supra.

In addition, the Government had other courses it could have taken in this case. In view of the District Court's error in granting a restraining order of unlimited duration without complying with the requirements for a preliminary injunction, the Government could have moved the District Court to dissolve its order indefinitely continuing the temporary restraining order. Rule 65(b) expressly provides for such a motion.[1] Had the Government followed this course, the District Court could have

[1] "On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require." Fed.Rule Civ.Proc. 65(b).



corrected its error and gone on to resolve the issues presented by the application for a preliminary injunction. The end result would have been the grant or denial of a preliminary injunction, with findings of fact and conclusions of law, which we could meaningfully review.

Here, instead, we find the Supreme Court determining that although the District Court had jurisdiction to grant injunctive relief, the equities of Mrs. Murray's case did not support a preliminary injunction, when neither the District Court nor the Court of Appeals has yet confronted the latter issue.[2] I do not believe this makes for sound law.

Since the majority persists in considering the merits of Mrs. Murray's claim for injunctive relief, some additional comment is in order. I agree with the majority's conclusion that Congress did not divest federal courts of their long exercised authority to issue temporary injunctive relief pending the exhaustion of both administrative and judicial review of an employee's claim of wrongful dismissal. I cannot accept, however, the way in which the majority opinion then proceeds to take away with the left hand what it has just given with the right, by precluding

[2] The Court of Appeals expressly stated that it was not evaluating Mrs. Murray's claim of irreparable injury because "any such finding . . . is for the trial judge, who has not yet [decided (and may never decide)] this point in favor of Mrs. Murray." 149 U.S.App.D.C. 256, 262 n. 21, 462 F.2d 871, 877 n. 21 (1972).

injunctive relief in all but so-called "extraordinary cases," whatever they may be.

At the outset, I see no basis for applying any different standards for granting equitable relief in the context of a discharged probationary employee than the long-recognized principles of equity applied in all other situations. See Virginia Petroleum Jobbers Assn. v. FPC, 104 U.S.App.D.C. 106, 259 F.2d 921 (1958). Indeed, it appears that the factors which the majority would have courts weigh before granting injunctive relief are all encompassed within the traditional formulations. The adequacy of backpay as a remedy, for example, is relevant in determining whether the party seeking relief has shown that "without such relief, it will be irreparably injured." Id., at 110, 259 F.2d, at 925. Likewise, the possible disruptive effect which temporary injunctive relief might have on the office where respondent was employed or on the administrative review process itself relates to whether "the issuance of a stay (will) substantially harm other parties interested in the proceedings." Ibid.

However one articulates the standards for granting temporary injunctive relief, I take it to be well settled that a prerequisite for such relief is a demonstrated likelihood of irreparable injury for which there is no adequate legal remedy. But I cannot accept the majority's apparent holding, buried deep in a footnote, that because of the Back Pay Act, a temporary loss in income can never support a finding of irreparable injury, no matter how severely it may affect a particular individual. See ante, at 953 n. 68. Many employees may lack substantial savings, and a loss of income for more than a few weeks' time might seriously impair their ability to provide themselves with the



essentials of life – e.g., to buy food, meet mortgage or rent payments, or procure medical services. Cf. Goldberg v. Kelly, 397 U.S. 254, 264, 90 S.Ct. 1011, 1018, 25 L.Ed.2d 287 (1970). Government employees might have skills not readily marketable outside the Government, making it difficult for them to find temporary employment elsewhere to tide themselves over until the lawfulness of their dismissal is finally determined. In some instances, the likelihood of finding alternative employment may be further reduced by the presence on the employee's records of the very dismissal at issue. Moreover, few employers will be willing to hire and train a new employee knowing he will return to his former Government position if his appeal is successful. Finally, the loss of income may be "temporary" in only the broadest sense of that word. Not infrequently, dismissed federal employees must wait several years before the wrongful nature of their dismissal is finally settled and their right to backpay established. See, e.g., Paroczay v. United States, 369 F.2d 720, 177 Ct.Cl. 754 (1966); Paterson v. United States, 319 F.2d 882, 162 Ct.Cl. 675 (1963).

The availability of a backpay award several years after a dismissal is scant justice for a Government employee who may have long since been evicted from his home and found himself forced to resort to public assistance in order to support his family. And it is little solace to those who are so injured to be told that their plight is "normal" and "routine." Whether common or not, such consequences amount to irreparable injury which a court of equity has power to prevent.

Nor can I agree with the majority's analysis of Mrs. Murray's claim of damaged reputation. It is argued that

Mrs. Murray can suffer no significant loss of reputation by procedural irregularities in effectuating her discharge because her claim is not that she could not as a matter of statutory or administrative right be discharged, but only that she was entitled to additional procedural safeguards in effectuating the discharge. Ante, at 953. In my view, this analysis not only reflects a total misunderstanding of the gist of Mrs. Murray's complaint, but also fails to comprehend the purposes behind the Civil Service Commission regulations at issue here.

The Commission provides a special pretermination procedure where a probationary employee is to be terminated "for conditions arising before appointment," not as an empty gesture, but rather because the employing agency might be mistaken about these preappointment conditions, and might decide not to dismiss the employee if he is given an opportunity to present his side of the story. Mrs. Murray does not seek a hearing as an end in itself, but rather to correct what she believes is a mistaken impression the agency had about her conduct in her prior job, in the hope what with the record straight, the agency would not discharge her. She seeks to save her job and to avoid the blot on her employment record that a dismissal entails, and it is in this sense that she claims her dismissal would injure her reputation.

Whether the likelihood of irreparable injury to Mrs. Murray if she is not allowed to retain her job pending her administrative appeal, when balanced against the Government's interests in having her out of the office during this period, supports equitable relief in the present case is a question I would leave for the District Court. Because of Mr. Sanders' absence, the District Court cut short its



hearing on the application for a preliminary injunction before either the Government or Mrs. Murray had an opportunity to present witnesses or other evidence. Mrs. Murray still has not had her day in court to present evidence supporting her allegation of irreparable injury, and what that evidence would be were she given that opportunity we can only speculate.

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**Rule 52. Findings by the Court; Judgment on Partial Findings**

**(a) Effect.** In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in subdivision (c) of this rule.

**(b) Amendment.** On a party's motion filed no later than 10 days after entry of judgment, the court may amend its findings – or make additional findings – and may amend the judgment accordingly. The motion may accompany a motion for a new trial under Rule 59. When findings of fact are made in actions tried without a jury, the sufficiency of the evidence supporting the findings may be later questioned whether or not in the district



court the party raising the question objected to the findings, moved to amend them, or moved for partial findings.

**(c) Judgment on Partial Findings.** If during a trial without a jury a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue, or the court may decline to render any judgment until the close of all the evidence. Such a judgment shall be supported by findings of fact and conclusions of law as required by subdivision (a) of this rule.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Apr. 28, 1983, eff. Aug. 1, 1983; Apr. 29, 1985, eff. Aug. 1, 1985; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 27, 1995, eff. Dec. 1, 1995.)

**Rule 65**

**(b) Temporary Restraining Order; Notice; Hearing; Duration.** A temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should

not be required. Every temporary restraining order granted without notice shall be endorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if the party does not do so, the court shall dissolve the temporary restraining order. On 2 days notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.